92-773

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM P. BARR, ATTORNEY GENERAL
OF THE UNITED STATES, PETITIONER

v.

ADULT VIDEO ASSOCIATION, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the pretrial restraint provisions of RICO are facially unconstitutional under the First Amendment.

2. Whether the court of appeals erred in holding that the post-trial forfeiture provisions of RICO violate the First Amendment when the predicate acts of racketeering are obscenity violations and the forfeited property consists of the assets of a business dealing in expressive materials.

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of William P. Barr, Attorney General of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The amended opinion of the court of appeals, App., *infra*, 1a-25a, is reported at 960 F.2d 781. The original opinion of the court of appeals, App., *infra*, 44a-68a, is unreported. The opinion of the district court, App., *infra*, 26a-39a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 12, 1992, and was amended on June 18,

1992. A petition for rehearing was denied on July 7, 1992. App., *infra*, 69a. On September 23, 1992, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including November 4, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the Constitution of the United States and the relevant provisions of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961-1968, are reprinted in the appendix to this petition. App., *infra*, 70a-74a.

STATEMENT

1. Respondents, who are an association of producers, a distributor, a retailer, and a consumer of sexually explicit video-tapes, brought this action against the Attorney General of the United States, claiming that certain provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961-1968, were facially unconstitutional when enforced against obscenity offenses. Respondents alleged, inter alia, that the pretrial restraint and post-conviction forfeiture provisions of RICO violate the First Amendment, because they constitute a prior restraint on and impermissibly chill respondents' exercise of their free speech rights. First Amended Complaint 2-28 (Jan. 21, 1988); Excerpts of Record (E.R.) 2-28.[1]

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[1] None of the respondents had been arrested for a violation of RICO, charged with a crime under that Act, or threatened with prosecution under that Act, nor had any respondent been the subject of pre-indictment seizures or restraint under

The government moved to dismiss the complaint under Rule 12(b)(6), Fed. R. Civ. P., on the ground that respondents had failed to state a claim for which relief could be granted. E.R. 32-68. The district court granted the government's motion in part and denied it in part, dismissing the complaint except insofar as respondents had challenged the civil remedies that can be imposed for RICO violations, 18 U.S.C. 1964. App., *infra*, 33a-39a.

The district court rejected respondents' claim that the RICO forfeiture provisions unconstitutionally "chilled" their exercise of First Amendment rights, holding that respondents' claim was merely "an artful attempt to bypass" the definition of obscenity adopted in *Miller* v. *California*, 413 U.S. 15 (1973), and applied in later cases. App., *infra*, 34a. Relying on *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697 (1986), the court held that RICO's post-trial forfeiture provisions are not a prior restraint and are, instead, a subsequent punishment imposed on defendants convicted of obscenity violations. App., *infra*, 35a-37a. Finally, the court held that RICO's pretrial restraint provision, 18 U.S.C. 1963(d), which authorizes a

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RICO. App., *infra*, 7a, 33a; Complaint 2-28; E.R. 2-28. In their complaint, respondents alleged that "[d]efendant [Attorney General] threatens to enforce the aforementioned RICO, sentencing and bail legislation against plaintiffs DOE, Inc., ROE, ROE, INC. and the membership of plaintiff ADULT VIDEO ASSOCIATION unless they cease the sale and/or exhibition of sexually oriented books" and other materials," and that "[u]nless restrained by this Court, defendant will enforce the new legislation against plaintiffs unless they forego dissemination of communicative media" protected under the First Amendment. Complaint paras. 61, 62, and 27. Respondent did not, however, recite any facts in support of those allegations.

court to enter pretrial relief to protect property subject to forfeiture, is not unconstitutional under *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989), which forbids the pretrial seizure of expressive materials based only on the finding that there is probable cause to believe that the materials are obscene. App., *infra*, 37a-38a. "Section 1963(d) does not specifically authorize pretrial *seizure* of materials subject to forfeiture," the court concluded, and "after *Fort Wayne Books* no district court judge can constitutionally order pretrial seizure of presumptively protected materials." *Id.* at 38a. The court therefore held that Section 1963(d) is not unconstitutional. App., *infra*, 38a.

Respondents thereafter moved voluntarily to dismiss their remaining claims regarding the constitutionality of the RICO civil remedy provisions. App., *infra*, 40a-42a. The district court granted the motion and entered a final judgment. *Id.* at 43a.

2. Respondents appealed, challenging only the district court's dismissal of their claims that RICO's pretrial restraint and post-trial forfeiture provisions violate the First Amendment. The court of appeals affirmed the district court's judgment in part and reversed it in part. App., *infra*, 44a-68a.[2]

Although the court of appeals held that the RICO statute was not facially unconstitutional in its en-

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[2] At the outset, the court of appeals held that respondents' claims were justiciable. Respondents had standing to bring their challenges and those challenges were ripe, the court held, because each of the parties was engaged in activities that could subject it to prosecution under RICO or to the threat of such prosecution. App., *infra*, 49a-52a.

tirety,[3] the court nonetheless held facially unconstitutional the provision authorizing pretrial restraints, 18 U.S.C. 1963(d). App., *infra*, 57a-58a. In the court's view, Section 1963(d) authorizes the pretrial seizure of expressive materials on a showing of probable cause to believe that they are obscene. App., *infra*, 57a. Because Section 1963(d) authorizes a seizure of expressive materials under circumstances that this Court found unconstitutional in *Fort Wayne Books*, the court of appeals held that Section 1963(d) is facially unconstitutional. App., *infra*, 57a-58a.

The court then turned to respondent's challenge to RICO's post-trial forfeiture provisions, 18 U.S.C. 1963(a). At the outset, the court rejected respondents' contention that Section 1963(a) constitutes an impermissible prior restraint, ruling that the post-trial forfeiture of property is a subsequent punishment. App., *infra*, 58a-62a. Nonetheless, the court went on to hold that "the current breadth of RICO's forfeiture provision cannot pass constitutional muster." *Id.* at 65a. While acknowledging that "the scope of RICO forfeiture is extremely broad, reaching nearly every asset remotely connected with the offense," *id.* at 63a, the court saw "the need to tailor criminal rules narrowly and carefully when they seek to operate within the First Amendment arena." *Id.* at 64a. Because this Court has generally demanded

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[3] Relying on *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989), the court held that RICO does not have an unconstitutional "chilling effect" on the exercise of respondents' First Amendment rights, because RICO incorporates other federal obscenity laws, which are themselves valid under *Miller* v. *California*, 413 U.S. 15 (1973). App., *infra*, 52a-55a. The court also concluded that RICO was not overbroad as applied to obscenity crimes. *Id.* at 55a-57a.

that laws touching free expression be "tailor[ed] * * * narrowly and carefully," *ibid.*, the court invalidated RICO's post-trial forfeiture provision "to the extent [it] mandates forfeiture of more property than the Constitution will tolerate as punishment for an obscenity offense." *Id.* at 63a. The court provided no guidance for determining what would be a lawful forfeiture of expressive materials, however; instead, the court left it to the district courts to determine those specific limits. *Id.* at 65a.

3. The government filed a petition for rehearing and a suggestion for rehearing en banc. On June 18, 1992, the court of appeals issued an order that amended its opinion by deleting two sentences from the court's discussion of the scope of forfeiture that would be constitutional under RICO. Compare App., *infra*, 65a, with *id.* at 22a.[4] Approximately three

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[4] In its original opinion, the Ninth Circuit wrote, App., *infra*, 65a:

> In light of these precedents, the current breadth of RICO's forfeiture provision cannot pass constitutional muster. **Forfeiture of those assets actually used in connection with the obscenity offense—that is, used to produce, market, or move obscenity through interstate commerce—does not run afoul of the First Amendment. Nor is the forfeiture of assets and interests substantially financed, directly or indirectly, by the proceeds of criminal activity constitutionally troublesome.**
>
> **However,** those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited.

In its revised opinion, the Ninth Circuit deleted the two sentences in bold face and changed the word "However" to "At the very least." *Id.* at 22a.

weeks later, the court denied the government's petition for rehearing. *Id.* at 69a.

REASONS FOR GRANTING THE PETITION

The court of appeals' decision holds unconstitutional two provisions of the RICO statute that Congress found essential to the efforts to combat organized crime. In so doing, the court misread the pretrial restraint provision of the act and misinterpreted the First Amendment. Review by this Court is unnecessary at this time, however, because the second question presented by this case is now pending before the Court in *Alexander* v. *United States*, cert. granted, No. 91-1526 (June 29, 1992). The decision in that case may resolve the second question presented here and is likely to affect the analysis of the first question. This Court therefore should hold the petition in this case pending its decision in *Alexander*.

1. a. The court of appeals held that RICO's pretrial restraint provision, 18 U.S.C. 1963(d), is facially unconstitutional because that provision, like the state law at issue in *Fort Wayne Books, Inc.* v. *Indiana*, 489 U.S. 46 (1989), authorized the pretrial seizure of expressive materials without a judicial determination that they are obscene. App., *infra*, 57a. That conclusion is wrong, because the federal racketeering statute is materially different from the state law that was at issue in *Fort Wayne Books*.

In *Fort Wayne Books*, the State filed a civil action in state court against Fort Wayne Books and two other companies, alleging that they had violated the state racketeering statute by engaging in repeated violations of the state obscenity law. Before trial, the State sought injunctive relief, including the seizure of property that was allegedly used in or derived

from racketeering activity. Following a hearing, the state trial court ordered the seizure of the three bookstores and their inventory. Fort Wayne Books, Inc., challenged (among other things) the pretrial seizure provision of the state racketeering law. This Court reversed, ruling that "mere probable cause to believe a legal violation has transpired is not adequate to remove books or films from circulation." 489 U.S. at 66. The Court thus held that the pretrial seizure provision of the state racketeering statute was unconstitutional as applied to expressive materials.[5]

The federal RICO statute is materially different from the state racketeering statute that was at issue in *Fort Wayne Books*. The Indiana statute specifically authorized the State to seize forfeitable property before trial. Indiana Code § 34-4-30.5-3(b) (Burns 1991). It provided that upon the filing of a civil forfeiture action, the government "may move for an order to have property subject to forfeiture seized by a law enforcement agency." See *Fort Wayne Books*, 489 U.S. at 51. By contrast, the pretrial restraint provision of 18 U.S.C. 1963(d) merely provides that a court may enter "a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in [18 U.S.C. 1963(a)] for forfeiture." The statute thus authorizes a court to grant less burdensome forms of relief than the pretrial seizure of expressive materials, as the lower fed-

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[5] The Court did remark, however, that "a single copy of a book or film may be seized and retained for evidentiary purposes based on a finding of probable cause." *Fort Wayne Books*, 489 U.S. at 63.

eral courts have noted.[6] For that reason, the district court was correct in holding that the RICO pretrial restraint provision does not specifically authorize the pretrial seizure of expressive materials that are potentially subject to forfeiture, and therefore is not facially unconstitutional. App., *infra*, 38a; accord *Alexander* v. *Thornburgh*, 713 F. Supp. 1278, 1292-1293 (D. Minn.), appeal dismissed, 881 F.2d 1081 (8th Cir. 1989); *United States* v. *Alexander*, 736 F. Supp. 968, 973-977 (D. Minn. 1990), on appeal, 943 F.2d 825 (8th Cir. 1991), cert. granted, No. 91-1526 (June 29, 1992). The court of appeals' contrary in-

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[6] For a discussion and examples of pretrial restraints other than the seizure of expressive materials in an obscenity case, see *United States* v. *Jenkins*, No. 92-2002 (5th Cir. Oct. 5, 1992), slip op. 125-126 (restraining order prohibiting the defendants and unindicted corporations from "selling, assigning, transferring, encumbering or removing from the jurisdiction of the court any assets owned by or owed to them," but allowing defendants to conduct normal business operations); *Alexander* v. *Thornburgh*, 713 F. Supp. 1278, 1292-1293 (D. Minn.) (ruling that a performance bond can be used), appeal dismissed, 881 F.2d 1081 (8th Cir. 1989); *United States* v. *Alexander*, 736 F. Supp. 968, 973-977 (D. Minn. 1990) (upholding order preventing alienation of real and personal property, a performance bond, transfer of money from bank accounts, and recordkeeping requirements), on appeal from judgment of conviction and entry of forfeiture, 943 F.2d 825 (8th Cir. 1991), cert. granted, No. 91-1526 (June 29, 1992). Compare *United States* v. *Pryba*, 674 F. Supp. 1502, 1508 n.16 (E.D. Va. 1987), aff'd, 900 F.2d 748 (4th Cir.), cert. denied, 111 S. Ct. 305 (1990). For examples of pretrial restraints imposed in cases not involving expressive materials, see, *e.g.*, *In re Assets of Billman*, 915 F.2d 916 (4th Cir. 1990), cert. denied, 111 S. Ct. 2258 (1991); *United States* v. *Paccione*, 730 F. Supp. 1237 (S.D.N.Y. 1990); *United States* v. *Perholtz*, 622 F. Supp. 1253 (D.D.C. 1985).

terpretation of the statute is not supported by its text.[7]

There is no reason to construe the RICO statute in the manner adopted by the court of appeals. The legislative history of the act is consistent with its text. The Senate Report on the bill that became the pretrial restraint provisions of the RICO statute explains that "[t]he sole purpose of the bill's restraining order provision" is "to preserve the status quo, *i.e.*, to assure the availability of the property pending disposition of the criminal case." S. Rep. No. 225, 98th Cong., 2d Sess. 204 (1983). As the courts explained in *Alexander* v. *Thornburgh*, 713 F. Supp. at 1292-1293, and *United States* v. *Alexander*, 736 F. Supp. at 973-977, that result can be accomplished without the pretrial seizure of expressive materials. See also *United States* v. *Jenkins*, No. 92-2002 (5th Cir. Oct. 5, 1992), slip op. 125-126. In addition, the general rule, applicable in cases involving the First Amendment or any other constitutional provision, is that an Act of Congress should not be read in a way that renders it unconstitutional if its text does not require that result. See, *e.g.*, *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 370-375 (1971); see generally *New York* v.

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[7] This Court noted in *Fort Wayne Books* that the government has a policy not to pursue pretrial seizure of expressive materials in RICO actions against "adult" bookstores or similar businesses. 489 U.S. at 67 n.13. The court of appeals quoted the portion of that comment in which this Court said that the federal RICO statute is "similar" to the Indiana racketeering statute. App., *infra*, 57a (quoting *Fort Wayne Books*, 489 U.S. at 67 n.13). This Court in *Fort Wayne Books*, however, did not purport to define the scope of the RICO statute.

Ferber, 458 U.S. 747, 769 n.24 (1982). Here, the text does not.

The court of appeals believed that because the RICO statute could be interpreted in an unconstitutional manner, the statute must be so construed and therefore must be held unconstitutional. As explained above, that is an erroneous approach as a matter of statutory construction. But it is also an erroneous application of the overbreadth doctrine. The Court has held that the mere fact that a court can conceive of some impermissible application of a statute is not enough to render that law facially unconstitutional. See *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 797-798 (1984); *New York* v. *Ferber*, 458 U.S. at 769-773. Section 1963(d) is not facially unconstitutional on the ground that it possibly could be applied in an unconstitutional manner. See *Taxpayers for Vincent*, 466 U.S. at 797-798. A restraint on the alienation of real estate, for example, does not prevent a party from distributing expressive materials before their legality has been adjudicated. Even if Section 1963(d) could be interpreted in an unconstitutional manner, that would be insufficient to "render it susceptible to an overbreadth challenge." 466 U.S. at 800. The number of legitimate applications of the Act are sufficient to prevent it from being labeled overbroad. Accordingly, the court of appeals erred in holding facially unconstitutional Section 1963(d) even if it were read to authorize pretrial seizure of expressive materials.

b. The Fifth Circuit's recent decision in *United States* v. *Jenkins*, No. 92-2002 (Oct. 5, 1992), illustrates that Section 1963(d) can be applied in a manner that does not offend the First Amendment. The defendants in *Jenkins* were charged under the RICO

statute based on violations of the federal and Texas obscenity laws. Thereafter, the government obtained a pretrial restraining order prohibiting the defendants and unindicted corporations from "selling, assigning, transferring, encumbering or removing from the jurisdiction of the court any assets owned by or owed to them." Slip op. 125. Nonetheless, the restraining order allowed the defendants and unindicted corporations otherwise to conduct their normal business operations. *Id.* at 126. The Fifth Circuit declined to resolve Jenkins' facial challenge to the RICO statute (in part because this Court has granted review in *Alexander*), but the court did address the constitutionality of the restraining order issued in that case. The court held that the restraining order did not amount to a prior restraint and, on the facts of the case, did not impede the defendants' exercise of their First Amendment rights. *Id.* at 127.

The Fifth Circuit recognized that RICO's pretrial restraining provisions can be implemented in a manner that does not violate the First Amendment. Moreover, the Fifth Circuit did not suggest that the order at issue in *Jenkins* was invalid on the ground that Section 1963(d) dictates that expressive materials *must* be seized prior to trial, and that the restraining order did not comply with the statute. Unlike the Ninth Circuit, therefore, the Fifth Circuit has correctly understood that Section 1963(d) can be applied in a constitutional manner by authorizing the district courts to impose restraints that do not require pretrial seizure of expressive materials.

2. Although the court of appeals rejected respondents' claim that RICO's post-conviction forfeiture provision, 18 U.S.C. 1963(a) (1988 & Supp. II 1990), is a prior restraint on free expression, the court never-

theless ruled that "tailor[ing] the scope of RICO forfeitures in obscenity cases" was necessary to "conform the statute to the dictates of the First Amendment." App., *infra*, 67a. The court held that "to the extent [18 U.S.C.] 1963 mandates forfeiture of more property than the Constitution will tolerate as punishment for an obscenity offense, the statute is unconstitutional on its face." *Id.* at 63a. At the same time, the court of appeals provided little guidance as to what expressive material could be confiscated. In fact, in its amended opinion the court muddied the waters by deleting what little guidance it had supplied in its original opinion. Compare App., *infra*, 65a, with *id.* at 22a; see page 6 note 4, *supra*.

The question whether 18 U.S.C. 1963(a) violates the First Amendment when the predicate acts of racketeering are obscenity violations and the forfeited property consists of the assets of a business dealing in expressive materials is pending before the Court in *Alexander* v. *United States*, cert. granted, No. 91-1526 (June 29, 1992).[8] The Court therefore should hold the petition in this case pending its decision in *Alexander*.

3. That course is appropriate with respect to the entire petition, including the first question presented. The Ninth Circuit relied heavily on this Court's decision in *Fort Wayne Books* in ruling that the pretrial restraint provision of the RICO act is unconstitutional. Because this Court's decision in *Alexander* will likely discuss the effect of the First Amendment on the RICO forfeiture provisions when the predicate

[8] The Ninth Circuit's decision in this regard conflicts with the Eighth Circuit's decision in *Alexander* and the Fourth Circuit's decision in *United States* v. *Pryba*, 900 F.2d 748, cert. denied, 111 S. Ct. 305 (1990).

acts of racketeering are obscenity violations and the forfeited property consists of the assets of a business dealing in expressive materials, the decision in *Alexander* may also affect the disposition of respondents' facial challenge to the pretrial restraining provisions of RICO, as the Fifth Circuit reasoned in *Jenkins*, slip op. 126-127. *Alexander* therefore may affect the proper disposition of both questions presented by this case.[9]

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Alexander* v. *United States*, No. 91-1526, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

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NOVEMBER 1992

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[9] Because respondents brought this facial challenge to RICO without being charged under that law, the court of appeals also may need to reconsider, in light of this Court's decision in *Alexander*, the appropriateness of such an action. See also *American Library Ass'n* v. *Barr*, 956 F.2d 1178 (D.C. Cir. 1992) (Randolph, J., joined by Thomas, J., sitting by designation).

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 90-55252

D.C. No. CV-87-7894-RSWL

ADULT VIDEO ASSOCIATION; DOE, INC.; ROE, INC.; PAUL POE, PLAINTIFFS-APPELLANTS

v.

WILLIAM BARR,* ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
May 6, 1991—Pasadena, California

Filed March 12, 1992
Amended June 18, 1992

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* Attorney General William Barr is substituted for Richard Thornburgh as defendant/appellee, pursuant to Fed. R. App. P. 43(c).

ORDER AND AMENDED OPINION

Before: Thomas Tang, Stephen Reinhardt and Charles Wiggins, Circuit Judges.

Opinion by Judge Tang

ORDER

The opinion issued in this case on March 12, 1992, is amended as follows:

On page 2565 of the opinion, delete lines 31-32 (*i.e.*, "Forfeiture of those assets . . . market, or move"). On page 2566 of the opinion, delete lines 1-4 (*i.e.*, "obscenity through interstate commerce . . . constitutionally troublesome."). On line 5 of page 2566, delete the paragraph break and substitute "At the very least," for "However,".

OPINION

TANG, Circuit Judge:

Adult Video Association, Doe, Inc., Roe, Inc., and Paul Poe filed an action seeking a declaration that the federal Racketeer Influenced and Corrupt Organizations Act's ("RICO") criminal provisions are facially unconstitutional when enforced against obscenity offenses. The district court granted the government's motion to dismiss for failure to state a claim. The plaintiffs appeal only the district court's dismissal of their First Amendment challenge to RICO's criminal provisions. We affirm in part and remand in part.

BACKGROUND

RICO, 18 U.S.C. §§ 1961-1968, imposes severe penalties on any person convicted of engaging in a pattern of racketeering activity. The penalties include prison terms of up to twenty years, substantial fines, and forfeiture of

> (1) any interest the [defendant] has acquired or maintained in violation of [RICO];
>
> (2) any—
>
> (A) interest in;
>
> (B) security of;
>
> (C) claim against; or
>
> (D) property or contractual right of any kind affording a source of influence over,
>
> any enterprise which the [defendant] has established, operated, controlled, conducted, or participated in the conduct of in violation of [RICO]; and
>
> (3) any property constituting, or derived from, any proceeds which the [defendant] obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of [RICO].

18 U.S.C. § 1963(a). Forfeiture is mandatory upon conviction. *Id.*

The statute also permits the government to apply to a district court for a pre-trial order to preserve assets for forfeiture. 18 U.S.C. § 1963(d). Courts may authorize pre-trial seizures of assets, issue restraining orders and injunctions, require the execution of performance bonds, and "take any other action

to preserve the availability of property . . . for forfeiture." 18 U.S.C. § 1963(d)(1).

A defendant is guilty of engaging in a pattern of racketeering activity if that person commits two or more acts of "racketeering activity." 18 U.S.C. § 1961(5). The statute includes a laundry list of racketeering activities, any one of which may serve as a predicate offense in a pattern of racketeering. 18 U.S.C. § 1961(1). In 1984, Congress added to the list of predicate offenses "any act . . . dealing in obscene matter . . . which is chargeable under State law and punishable by imprisonment for more than one year" and "any act which is indictable under" the federal obscenity laws, 18 U.S.C. §§ 1461-1465. 18 U.S.C. § 1961(1); *see also* Pub. L. No. 98-473, 98 Stat. 1837 (1984).

The appellants, Adult Video Association, Doe, Inc., Roe, Inc., and Paul Poe (collectively, "Adult Video") are a producer, distributor, retailer, and consumer of sexually explicit videotapes, respectively. They brought an action against the Attorney General of the United States challenging RICO's provisions as facially unconstitutional under the First, Fifth, and Eighth amendments to the federal Constitution.[1]

Adult Video's complaint asserts that RICO's authorization of pre-trial seizures and its comprehensive post-trial forfeiture provisions amount to unconstitutional prior restraints on speech. Adult Video also argues that the severe penalties RICO authorizes for as few as two obscenity violations, when combined

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[1] Adult Video presses only the First Amendment claim in this appeal. The original action also attacked RICO's civil remedies, 18 U.S.C. § 1964, as unconstitutional. Adult Video does not contest the constitutionality of RICO's civil remedies here.

with the inherent uncertainty of deciding what qualifies as obscenity, chills constitutionally protected erotic and sexually explicit speech. In support of its position, Adult Video cites the decision of Roe, Inc. not to rent or sell any sexually explicit videotapes and Roe, Inc.'s inability to obtain any non-explicit, erotic videotapes due to distributors' liability concerns. Adult Video also points to Paul Poe's asserted inability to rent or to buy sexually explicit videos for home viewing, because video stores fear that they will become the object of a racketeering prosecution.

The government moved under Fed. R. Civ. P. 12 (b)(6) to dismiss Adult Video's action for failure to state a claim. In August 1989, the district court granted the motion with respect to every claim except the count challenging RICO's civil remedies. The court rejected Adult Video's argument that a First Amendment chill emanates from a combination of (i) the inherent ambiguities in the definition of obscenity, (ii) the lax scienter requirement for obscenity, and (iii) the severe punishments RICO authorizes.[2] The court characterized Adult Video's argument as little more than "an artful attempt to bypass" the Supreme Court's definition of obscenity in *Miller v. California*, 413 U.S. 15 (1973).

With respect to Adult Video's prior restraint argument, the district court held that RICO imposed "subsequent punishment," rather than a prior restraint, on defendants duly convicted of obscenity violations.

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[2] Adult Video also included in this formula the stiff detention and sentencing provisions contained in the Bail Reform Act of 1984, 18 U.S.C. §§ 3142-43, 3147-48, and the Sentencing Reform Act of 1984, 28 U.S.C. §§ 991-98, as applied to obscenity prosecutions. Adult Video does not rely upon either of these statutes in its argument on appeal.

Relying on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), the district court concluded that such subsequent punishment did not run afoul of the First Amendment.

Finally, the district court rejected the argument that section 1963(d)'s authorization of pre-trial seizures made the provision facially unconstitutional. The court acknowledged that the Supreme Court's opinion in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), effectively foreclosed pre-trial seizures of allegedly obscene materials under RICO. The district court nonetheless found facial invalidation inappropriate because section 1963(d) authorizes a variety of other pre-trial measures the facial constitutionality of which Adult Video does not question.

In January 1990, Adult Video filed a motion for voluntary dismissal of its only remaining claim (the constitutionality of RICO's civil remedies). The district court granted the motion and entered a final judgment on January 25, 1990.

Adult Video subsequently filed a timely notice of appeal to this court.

DISCUSSION

I. *Standard of Review*

We review the district court's dismissal of the complaint for failure to state a claim de novo. *Hartford Accident & Indem. Co. v. Continental Nat'l Am. Ins. Cos.*, 861 F.2d 1184, 1185 (9th Cir. 1988). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985), *cert. denied*, 474 U.S.

1056 (1986). We limit our review to the contents of the complaint and construe all allegations of material fact in the light most favorable to Adult Video. *Id.*

II. *Standing and Ripeness*

While the parties do not contest Adult Video's standing, we have an independent obligation to verify its authority to adjudicate this case. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990). Because the federal government is not prosecuting Adult Video under RICO, Adult Video must show "a 'reasonable threat of prosecution for conduct allegedly protected by the Constitution.'" *Polykoff v. Collins*, 816 F.2d 1326, 1331 (9th Cir. 1987) (quoting *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*, 477 U.S. 619, 625 n.1 (1986)); *see also Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir. 1989).

Adult Video passes this test. Each of the parties alleges that it either produces, distributes, sells, or consumes erotic videotapes and that its activities either could subject it to RICO prosecution or are chilled by the threat of such prosecution. The government's active enforcement of RICO's obscenity provision against other videotape distributors[3] demonstrates that the threat of prosecution is real. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988).

While Adult Video does face a reasonable threat of prosecution, its complaint challenges more than the constitutionality of RICO obscenity prosecutions in and of themselves. Adult Video also objects to the seizures that may occur prior to a prosecution and to

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[3] *See, e.g., United States v. Pryba*, 900 F.2d 748 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990).

the penalties that automatically follow a conviction. Consequently, our standing query must proceed one step further and determine whether Adult Video faces a reasonable threat of pre-trial seizure or post-conviction forfeiture. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 303 (1979).

Nothing in the record before us indicates that the Department of Justice has conducted pre-trial seizures in RICO obscenity cases. *See Fort Wayne Books*, 489 U.S. at 67 n.13 (noting that the United States asserted in its 1988 *amicus curiae* brief that it did not engage in such activity). The statute nevertheless authorizes such seizures. In addition, no formal policy of the Department of Justice prohibits its prosecutors or officers from pursuing pre-trial seizures, and enforcement practices may change at any time in any case. Consequently, Adult Video's apprehension concerning pre-trial seizure is reasonable. Therefore, Adult Video does have standing to litigate this claim.

Likewise, because RICO mandates forfeiture upon conviction and expressly defines its scope, leaving district courts no discretion to limit it, we hold that the reasonable threat of prosecution confronting Adult Video necessarily entails a reasonable threat of post-trial forfeiture. *See Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 633-34 (7th Cir.) (court entertains pre-enforcement challenge to post-conviction forfeiture provision), *cert. denied*, 111 S. Ct. 387 (1990); *cf. Babbitt*, 442 U.S. at 303 (challenge to vagueness of criminal penalty provision). Adult Video thus has standing to challenge the post-trial forfeiture provision as unconstitutional.

With respect to the argument of an unconstitutional chill, Adult Video has alleged an actual injury.

It alleges an immediate and tangible chill on distribution, as well as on a consumer's and a retailer's ability to obtain erotic and sexually explicit videotapes. "To the extent the provisions require [Adult Video] and similarly situated businesses to exercise self-censorship, they are required to exercise self-censorship today." *Sequoia Books*, 901 F.2d at 634; *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963) (standing exists if governmental action impairs sales by the plaintiffs of arguably protected materials).

The absence of an active prosecution against Adult Video also raises the question of ripeness. Our conclusion that a reasonable threat of prosecution exists, for purposes of standing, effectively dispenses with any ripeness problem. The threat of a pre-trial (indeed, pre-prosecution) seizure may be reasonably discerned from the statute's text and the government's practices in other RICO cases.

Adult Video's objections to the post-trial remedy of forfeiture are also ripe. Adult Video's fear of forfeiture is reasonable and is alleged currently to have a concrete impact on Adult Video's exercise of its First Amendment rights. *See Babbitt*, 442 U.S. at 303.[4]

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[4] Since *Babbitt*, at least four Justices have expressed the view that "it does not follow that a challenge to whatever *remedy* might ultimately be fashioned (should liability be established and relief ordered) is ripe merely upon a showing of a 'reasonable threat' that proceedings will commence," *Ohio Civil Rights*, 477 U.S. at 633 n.4 (Stevens, J., concurring) (original emphasis); *see also Fort Wayne Books*, 489 U.S. at 60 (challenge to state RICO civil forfeiture not ripe because "[t]hese claims can only be reviewed when (or if) such remedies are enforced against petitioner"). These

III. *Unconstitutional Chill*

Adult Video contends that the combination of RICO's severe penalty provisions, the nebulous definition of obscenity, and the absence of a rigorous scienter requirement for obscenity offenses hangs like a Sword of Damocles over those engaged in sexually explicit speech, unconstitutionally chilling protected communication.

Adult Video's concerns about the fragility of sexually explicit speech and the likely consequences of its entanglement in this regulatory web have great practical appeal. The Supreme Court, however, has already rejected an essentially identical argument in *Fort Wayne Books*. There the Supreme Court found unpersuasive the bookstore operators' contention that the inherent vagueness of *Miller*'s obscenity standard and the draconian penalties attaching to a RICO conviction in Indiana transgressed the First Amendment. The Court characterized the vagueness argument as "nothing less than an invitation to overturn *Miller*—an invitation that we reject." 489 U.S. at 57; *see also Alexander v. Thornburgh*, 943 F.2d 825, 832 (8th Cir. 1991).

Here, as in *Fort Wayne Books*, the RICO statute simply incorporates the state and federal obscenity

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cases are distinguishable, though, because the only uncertainty in this case is whether prosecution will result. The federal RICO statute prescribes the penalty that district courts *must* impose. Justice Stevens' concurrence spoke to a situation where the adjudicative body had the authority to tailor its remedies to avoid a constitutional violation. *See Ohio Civil Rights*, 477 U.S. at 633 n.4. Likewise, the pursuit of civil forfeiture in addition to criminal penalties under Indiana's RICO statute is optional for prosecutors. *See Fort Wayne Books*, 489 U.S. at 60.

laws—laws which Adult Video does not contend violate *Miller*'s constitutional limitations on the definition of obscenity. Whatever vagueness or indefiniteness plagues these statutes is, as long as *Miller* remains good law, constitutionally tolerable. Transporting these laws into RICO does not exacerbate the haziness of the obscenity definition. It simply alters the format for prosecuting repeated violations of the obscenity laws. *See Fort Wayne Books*, 489 U.S. at 58 ("Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either."); *Alexander v. Thornburgh*, 713 F. Supp. 1278, 1291 & n.7 (D. Minn.), *appeal dismissed*, 881 F.2d 1081 (8th Cir. 1989).

The Supreme Court also dismissed the bookstore operators' objections to Indiana's stiff RICO penalties by declaring any additional deterrent effect on protected speech to be the inevitable consequence of the criminal law's legitimate efforts to deter and to punish obscenity:

> It may be true that the stiffer RICO penalties will provide an additional deterrent to those who might otherwise sell obscene materials; perhaps this means—as petitioner suggests—that some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene."

Id. at 60 (quoting *Smith v. California*, 361 U.S. 147, 154-55 (1959)) (citation omitted); *see also Sequoia Books*, 901 F.2d at 637 ("The *in terrorem* effects of which Sequoia complains are simply the intended by-product of a legislative decision to punish those who deal in obscene materials and to make that business more costly."); *United States v. Pryba*, 900 F.2d 748, 756 (4th Cir.) (chill caused by RICO penalties does not violate the First Amendment because "[t]he fact that a person does some business disseminating protected materials cannot immunize that person from [penalties] that may be imposed for violation of criminal law") (quotation omitted), *cert. denied*, 111 S. Ct. 305 (1990); *Polykoff*, 816 F.2d at 1340 n.9.

Fort Wayne Books is thus dispositive of Adult Video's unconstitutional chill argument.

IV. *Unconstitutional Overbreadth*

Adult Video argues that RICO, as applied to obscenity, is subject to facial invalidation for overbreadth. Specifically, Adult Video contends that the penalty provisions impermissibly stifle constitutionally-protected sexually explicit speech. Enforcement of RICO in the obscenity context, Adult Video continues, can never legitimately occur because any consequent forfeiture would represent an unconstitutional prior restraint.

The overbreadth doctrine constitutes an exception to the general rule requiring the constitutionality of a statute to be tested against the conduct of the party before the court. It permits a party to challenge a law, not on the ground that the statute is unconstitutional as enforced against it, but rather on the ground that the statute's application to third persons not before the court violates the First Amendment. *Mem-*

bers of the City Council v. Taxpayers for Vincent, 466 U.S. at 789, 798-99 & n.17 (1984); *see also New York v. Ferber*, 458 U.S. 747, 768-69 (1982).

> [T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanctions provided by a statute susceptible of application to protected expression.

Taxpayers for Vincent, 466 U.S. at 799 n.17 (quotations and citations omitted). In order to prevail, the plaintiff must demonstrate "substantial" overbreadth, " 'judged in relation to the statute's plainly legitimate sweep.' " *Taxpayers for Vincent*, 466 U.S. at 799-800 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

In light of these precedents, we reject Adult Video's overbreadth challenge. Adult Video's argument is little more than an amalgam of its unconstitutional prior restraint and chill arguments. Adult Video has not demonstrated the type of showing necessary to maintain an overbreadth challenge on First Amendment grounds. Adult Video's overbreadth theory simply mirrors the constitutional arguments it makes concerning the RICO obscenity provisions' effects on its own ability to produce, distribute, sell, and consume sexually explicit videotapes.

In *Taxpayers for Vincent*, the Supreme Court rebuffed an overbreadth argument on precisely this ground:

> This is not . . . an appropriate case to entertain a facial challenge based on overbreadth. For we have found nothing in the record to indicate that the ordinance will have any different impact on any third parties' interests in free speech than it has on [plaintiffs].
>
> . . . [Plaintiffs] have, in short, failed to identify any significant difference between their claim that the ordinance is invalid on overbreadth grounds and their claim that it is unconstitutional when applied to [them]. . . . [Plaintiffs] have simply failed to demonstrate a realistic danger that the ordinance will significantly compromise recognized First Amendment protections of individuals not before the Court.

Id. at 801-02.

V. *RICO's Pre-Trial Seizure and Post-Trial Forfeiture Provisions*

A. *Pre-Trial Seizures*

Adult Video contends that RICO's section 1963(d) is facially unconstitutional because it permits the pre-trial seizure of videotapes based only on a finding of probable cause to believe they are obscene.

The Supreme Court's recent opinion in *Fort Wayne Books* leaves little room for argument over the unconstitutionality of pre-trial seizures of allegedly obscene materials. Indeed, the government foregoes any such argument here. The Supreme Court held in *Fort Wayne Books* that pre-trial seizures of allegedly

obscene books and films pursuant to Indiana's RICO statute violated the First Amendment. "[P]robable cause to believe that there are valid grounds for seizure," the Court explained, "is insufficient to interrupt the sale of presumptively protected books and films." 489 U.S. at 66.

This holding translates readily to the federal RICO context. Indeed, the Supreme Court noted that Indiana's RICO statute was "similar" to the federal racketeering law. *Fort Wayne Books*, 489 U.S. at 67 n.13. Federal RICO also permits pre-trial seizures upon a showing of probable cause. Thus, the Supreme Court's concern that films not be removed from circulation prior to "[a] determination that the seized items [are] 'obscene' or that a RICO violation *has occurred*" applies with equal vigor in this instance. *Id.* at 66 (original emphasis). The First Amendment will not tolerate such seizures until the government's reasons for seizure weather the crucible of an adversary hearing. *Id.* at 67 ("[W]here the RICO violation claimed is a pattern of racketeering that can be established only by rebutting the presumption that expressive materials are protected by the First Amendment, that presumption is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding.") (footnote omitted).[5]

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[5] The Supreme Court's concerns about premature seizure of expressive material operate even more forcefully in this case. Under Indiana's law, the defendant had already been convicted of the predicate RICO offenses, so the seizures were based upon both a history of obscenity convictions as well as probable cause. *Fort Wayne Books*, 489 U.S. at 66. Under the federal RICO statute, the predicate offenses need not be established prior to trial.

Because the reasoning of *Fort Wayne Books* is equally applicable to the federal RICO statute, we hold that the portion of section 1963(d) that authorizes pre-trial seizures is unconstitutional on its face.[6] We therefore reverse on this issue and direct the district court to enter judgment for Adult Video.

B. *Post-Trial Forfeiture*

Adult Video argues that RICO's post-trial forfeiture penalty constitutes an unlawful prior restraint because, by seizing assets beyond those adjudged obscene, it exacts as a toll for past transgressions the defendant's ability to communicate in the future. While we decline to equate these forfeitures with prior restraints, we also conclude that some tailoring of the scope of forfeiture is necessary to harmonize RICO's post-trial forfeiture penalty with the First Amendment.

1. *Prior Restraint*

Because a RICO forfeiture occurs only after a criminal trial on the obscenity issue, with its full panoply of procedural protections, the forfeiture represents punishment for engaging in obscenity rather than a prior restraint. "There is a historical distinction between prior restraints and criminal penalties in the first amendment setting, which has both practical consequences and a theoretical basis." *Polykoff*, 816 F.2d at 1337.

The primary concern animating the Supreme Court's prior restraint jurisprudence has been to pre-

[6] Because Adult Video does not challenge the other pre-trial procedures authorized by section 1963(d), we need not address their constitutionality.

vent the government from seizing materials or otherwise halting speech prior to a determination that the speech is actually harmful. *See, e.g., Fort Wayne Books*, 489 U.S. at 66-67 (seizure inappropriate because effected prior to a judicial determination of obscenity); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316-17 (1980) (per curiam) (prior restraint unconstitutional because speech not yet adjudged unlawful); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964) (warrant for seizure unconstitutional because not preceded by a hearing on obscenity); *Marcus v. Search Warrant of Property at 104 E. Tenth St.*, 367 U.S. 717, 731 (1961) (warrants to seize alleged obscenity unconstitutional because of inadequate procedural safeguards); *cf. Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 444-45 (1957) (seizure after determination of obscenity in a criminal trial does not violate the First Amendment). The Court's constant refrain has been that it is better to punish harmful speech after it occurs than to smother it at birth. *See, e.g., Vance*, 445 U.S. at 316 n.13 ("[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.") (original emphasis); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714-15 (1931).

The prior restraint cases do not stand for the proposition that harmful speech can never be punished. To the contrary, case law expressly permits punishment so long as the process for determining the appropriateness of sanctions "embod[ies] the most rigorous procedural safeguards" and is "ringed about with adequate bulwarks." *Bantam Books*, 372 U.S. at 66. The protections contained in a criminal RICO prosecution—such as the allocation of the burden of

proof, a heightened standard of proof, and adversariness—satisfy *Bantam's* command.

In *Kingsley Books*, the Supreme Court sustained a New York statute permitting the seizure of obscene books and an order enjoining the defendant from further distribution of such books because, unlike the prior restraint cases, a court imposed these penalties only after the books had been adjudged obscene in a criminal trial. 354 U.S. at 445 ("Unlike *Near* [*v. Minnesota*], [the New York Law] is concerned solely with obscenity and . . . studiously withholds restraint upon matters not already published and not yet found to be offensive."); *see also Bantam Books*, 372 U.S. at 70 ("Criminal sanctions may be applied only after a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process.").

RICO likewise postpones forfeiture until a judicial determination of obscenity is made after a criminal trial.[7] Only at this point does RICO permit "the seizure . . . of the instruments of ascertained wrongdoing." *Kingsley Books*, 354 U.S. at 444; *see also Sequoia Books*, 901 F.2d at 636 (post-trial forfeiture under Illinois obscenity statute does not violate the First Amendment because "Illinois does not attempt here to regulate the sale of protected reading materials or to close bookstores. It merely punishes past obscenity convictions."); *Western Business Sys., Inc. v. Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980) (post-trial forfeiture under Georgia's RICO statute does not entrench upon free speech rights).

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[7] As noted earlier, we have no occasion to address the facial constitutionality of RICO's civil forfeiture provision, 18 U.S.C. 1964, in this case.

The purpose of the forfeiture is to strip the defendant of the tools and profits of criminal conduct and thereby to terminate the illegal enterprise. Thus, unlike prior restraints, it is the defendant's unlawful commercial conduct (dealing in obscenity) rather than the defendant's anticipated speech that sets into motion a RICO forfeiture. In *Arcara*, 478 U.S. at 705-07, the Supreme Court upheld an order of closure of an adult bookstore. It refused to equate the closure with a prior restraint in part because, as with RICO, non-expressive conduct (prostitution on the premises), rather than speech, prompted the closure. *Id.* at 705 n.2; *see also Pryba*, 900 F.2d at 755.

Also like the orders sustained in *Arcara* and *Kingsley Books*, RICO forfeiture does not silence the defendant. Forfeiture simply precludes the defendant from using assets derived from the obscenity trade to subsidize future speech. *See Arcara*, 748 U.S. at 706 n.2 (order "impose[s] no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location"); *511 Detroit St., Inc. v. Kelley*, 807 F.2d 1293, 1299 (6th Cir. 1986) (heavy fines imposed under Michigan's anti-obscenity law do not constitute prior restraints because "there is no prospective legal restraint on any expression, obscene or protected, that [defendants] . . . may choose to undertake"), *cert. denied*, 482 U.S. 928 (1987). A forfeiture is not a gag order. RICO defendants do not risk contempt if they revive that portion of their business dealing in sexually explicit and erotic videotapes after conviction. Defendants simply have no First Amendment right to use the profits and proceeds from trafficking in obscenity to finance their constitutionally protected speech. We agree with the Fourth Circuit that "de-

fendants may not launder their money derived from racketeering activities by investing it in bookstores, videos, magazines and other publications. The First Amendment may be used as a shield, but it is not a shield against criminal activity." *Pryba*, 900 F.2d at 755.

2. *Scope of Forfeiture*

Although we will not characterize RICO forfeiture as a prior restraint, we do consider it necessary to tailor the scope of the forfeiture permitted by statute to alleviate constitutional concerns about curtailing legitimate speech in the name of fighting obscenity. While the authorization of a forfeiture does not by itself render the RICO statute unconstitutional, to the extent section 1963 mandates forfeiture of more property than the Constitution will tolerate as punishment for an obscenity offense, the statute is unconstitutional on its face.

As noted earlier, the scope of RICO forfeiture is extremely broad, reaching nearly every asset remotely connected with the offense. "[F]orfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity, but rather extends to the convicted person's entire interest in the enterprise." *United States v. Busher*, 817 F.2d 1409, 1413 (9th Cir. 1987). We have already observed that "RICO's breadth and inflexibility counsel[] caution, for no penalty is per se constitutional." *Id.* at 1414 (quotation omitted); *cf. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, —— U.S. ——, 112 S. Ct. 501, 511-12 (1991) (statute designed to deprive convicted criminals of profits and proceeds from publicizing their

crimes not sufficiently tailored to survive First Amendment scrutiny).

For purposes of comparison, a number of other obscenity statutes contain markedly less drastic forfeiture provisions than federal RICO does. Illinois's obscenity statute permits forfeiture only of the direct and indirect proceeds of obscenity violations and the assets used wholly or in part to subsidize the actual criminal conduct. *See Sequoia Books*, 901 F.2d at 632; *see also id.* at 637-38 (comparing the scope of forfeiture permitted by Illinois law and by federal RICO). The federal Child Protection and Obscenity Enforcement Act likewise limits forfeitures to (i) the obscene materials themselves, (ii) property constituting or traceable to the gross profits or proceeds obtained from the offense, and (iii) property actually used or intended to be used to commit or to promote the offense. 18 U.S.C. §§ 1466(a), 2253(a); *cf. Fort Wayne Books*, 489 U.S. at 65 ("[W]e assume without deciding that bookstores and their contents are forfeitable . . . when it is proved that these items are property *actually used in, or derived from*, a pattern of violations of . . . obscenity laws.") (emphasis added).[8]

The Supreme Court, in the past, has recognized the need to tailor criminal rules narrowly and carefully when they seek to operate within the First Amendment arena. "Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in set-

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[8] Indiana's RICO statute requires forfeiture only of property "used in the course of, intended for use in the course of, derived from, or realized through" the racketeering activity. *Fort Wayne Books*, 489 U.S. at 51.

tings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith*, 361 U.S. at 150-51 (citing examples); *see also Simon & Schuster*, 112 S. Ct. at 512 (New York's "Son of Sam" law held to be "inconsistent with the First Amendment" because not narrowly tailored to achieve goal of compensating victims from the fruits of the crime); *Quantity of Books*, 378 U.S. at 211-12 (state may not treat ordinary contraband and obscene books the same for purposes of seizure because of the First Amendment concerns infusing the latter); *accord Speiser v. Randall*, 357 U.S. 513, 525 (1958) ("The separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . .")

In light of these precedents, the current breadth of RICO's forfeiture provision cannot pass constitutional muster. At the very least, those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited. As in *Busher*, district courts should not, absent exceptional circumstances, "order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO [obscenity] violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income." 817 F.2d at 1415-16. Because Adult Video raises only a facial attack, we leave for the district courts the specific formulation of RICO forfeiture orders that are consistent with the First Amendment, in light of the particular facts presented in individual cases. *Cf. id.*

The government no doubt believes that diminishing the scope of RICO forfeiture in this manner will dilute the statute's deterrent effect and risk a resurrection of the criminal enterprise. While these are important concerns, the incremental contribution that RICO's current sweeping forfeiture provisions make to the deterrence and destruction of criminal enterprises over what would be accomplished under a narrower definition of forfeitable assets does not justify the additional curtailment of constitutionally protected, sexually explicit speech. *See Simon & Schuster*, 112 S. Ct. at 509 ("[W]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.") (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)). Tailoring the scope of forfeiture acknowledges that in obscenity cases, unlike traditional RICO prosecutions, a countervailing concern for protecting the public's right to receive, as well as the defendant's right to engage in, non-obscene speech demands a more delicate approach to forfeitures. *See Marcus*, 367 U.S. at 736 (expressing concern for the "public's opportunity to obtain . . . publications" because the state's obscenity seizure law deterred the sale and distribution of speech falling under the First Amendment's aegis). The forfeiture of assets derived from drugs, arson, fraud, and murder rarely, if ever, implicates a public right of access to information. The forfeiture of assets loosely affiliated with obscenity offenses, by contrast, hurts not just the defendant, but also those members of the public who wish to obtain sexually explicit and erotic videotapes. Government "is not free to adopt whatever procedures it pleases for dealing with obscenity

. . . without regard to the possible consequences for constitutionally protected speech." *Id.* at 731; *see also Smith*, 361 U.S. at 154 (strict liability provision in obscenity statute unconstitutional because it would "restrict the public's access to forms of the printed word which the State could not constitutionally suppress directly").

In sum, we hold that RICO's provisions permitting the pretrial preservation of assets for forfeiture are not facially unconstitutional in obscenity cases. Only that part of section 1963(d) that authorizes pre-trial seizures of obscene materials on the basis of probable cause is unconstitutional. Post-trial forfeiture do not, on their face, amount to prior restraints. We find it necessary, however, to tailor the scope of RICO forfeitures in obscenity cases in order to conform the statute to the dictates of the First Amendment. So delineated, RICO's post-trial forfeiture provisions are not facially unconstitutional.

CONCLUSION

James Madison observed that " '[s]ome degree of abuse is inseparable from the proper use of everything.' " *Near*, 283 U.S. at 718 (quoting *Report on the Virginia Resolutions*, *Madison's Works*, vol. iv, 544). Speech, perhaps more than any other constitutionally protected activity, offers a daily demonstration of the truth of Madison's words. The First Amendment, however, strictly regulates government's authority to punish expression in the name of curbing abuse. Our Constitution prefers to err on the side of protecting speech. "[I]t is better to leave a few of [speech's] noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of

those yielding the proper fruits." *Id.* (quoting *Report on the Virginia Resolutions*, *Madison's Works*, vol. iv, 544). RICO's scattershot method of criminal prosecution is ill-suited to the delicate task of policing sexually explicit expression.

Although we hold that forfeiture provisions in general do not amount to unconstitutional prior restraints, the breadth of RICO's current forfeiture provision is incompatible with the First Amendment. Only those assets traceable to or substantially intertwined with the obscenity racketeering enterprise may be forfeited. Similarly, while we uphold section 1963 (d)'s provision for the pre-trial preservation of assets, we invalidate that portion of the section that permits pre-trial seizures of obscenity merely on a showing of probable cause.

Adult Video has not made out a claim of overbreadth because it has not demonstrated that RICO impacts third parties' speech any differently than it does its own.

Finally, we reject Adult Video's unconstitutional chill argument, in light of the Supreme Court's disposition of a similar claim in *Fort Wayne Books*.

The decision of the district court is AFFIRMED IN PART and REVERSED IN PART. Each party to this appeal shall bear its own costs.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. CV 87-7894-RSWL

ADULT VIDEO ASSOCIATION, a California corporation, DOE, INC., a California corporation, RICHARD ROE, ROE, INC., a Utah corporation, PAUL POE, and LORETTA HAROIAN, PLAINTIFFS

v.

RICHARD THORNBURGH, in his official capacity only as Attorney General of the United States, DEFENDANT

ORDER

[Filed Aug. 18, 1989; Entered Aug. 21, 1989]

Defendant, the Attorney General of the United States ("Thornburgh")[1], filed a motion to dismiss plaintiffs' First Amended Complaint ("Complaint") on February 22, 1988. Plaintiffs (collectively "Adult Video") timely filed opposition and Thornburgh filed a reply. Oral argument on the motion was originally scheduled for March 21, 1988 but was continued several times by stipulation of the parties. During the period of March 21 to June 9, 1989 the parties filed several supplementary briefs concerning recent Supreme Court decisions relevant to the matter now

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[1] When plaintiffs commenced this action, Edwin Meese III was Attorney General of the United States and the named defendant. Pursuant to Fed. R. Civ. P. 25(d)(1), Richard Thornburgh has been substituted in as the named defendant.

before this Court. In June 1989, after the supplemental briefing was concluded, the Court took Thornburgh's motion under submission for disposition based on the papers pursuant to Fed. R. Civ. P. 78.

Now, having read and considered all the filed papers, the Court hereby issues the following orders:

Thornburgh's Motion to Dismiss Adult Video's Complaint is GRANTED IN PART and DENIED IN PART. Specifically, all claims alleging violation of the Fifth Amendment are DISMISSED. All claims alleging impermissible chilling effects in violation of the First Amendment are DISMISSED. The claim which seeks to enjoin Thornburgh from enforcing a particular interpretation of 18 U.S.C. § 3142(e) is DISMISSED. All but one of the claims alleging prior restraints in violation of the First Amendment are DISMISSED. The claim which alleges that 18 U.S.C. § 1964 authorizes prior restraints in violation of the First Amendment withstands a Fed. R. Civ. P. 12 (b)(6) challenge and Thornburgh's Motion to Dismiss this portion of the Complaint is DENIED.[2]

JURISDICTION

Adult Video seeks declaratory and injunctive relief against the enforcement of various federal statutes on the ground that said statutes violate the Constitution of the United States. Accordingly, this Court has federal question jurisdiction over the matter pursuant to 28 U.S.C. § 1331.

Furthermore, this Court has jurisdiction pursuant to 28 U.S.C. § 1346(a)(2) because Thornburgh is

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[2] All claims alleging violation of the Eighth Amendment have been voluntarily withdrawn by Adult Video. Opposition, p. 8, 11, 8-12.

being sued in his official capacity as an officer of the United States Government for an amount not exceeding $10,000.00 on a claim founded upon the United States Constitution.

In addition, this Court has authority under 28 U.S.C. § 2201 to declare the rights of the parties before it and, pursuant to 28 U.S.C. § 2202, may issue such further relief, including injunctive relief, as it deems necessary and proper.

BACKGROUND

In 1970 Congress enacted the Racketeer Influenced and Corrupt Organizations Act ("RICO"), codified at 18 U.S.C. §§ 1961-68. RICO authorizes criminal penalties and civil restraints against persons convicted of engaging in a "pattern of racketeering activity," which is defined at 18 U.S.C. § 1961(5) as requiring two or more violations of various predicate offenses set forth at 18 U.S.C. § 1961(1). RICO also authorizes certain pretrial restraints designed to preserve the availability of property which the Government contends is subject to forfeiture. The predicate offenses listed in the original RICO statute did not include violations of any state or federal anti-obscenity laws.

In 1984 Congress enacted the "Comprehensive Crime Control Act of 1984" ("1984 Act"), which included the three provisions now challenged by Adult Video. First, the 1984 Act added "dealing in obscene matter" as a predicate RICO offense. Second, the 1984 Act incorporated the "Bail Reform Act of 1984" ("Bail Act"), which altered the rules pertaining to release on bail for those charged with, or appealing from conviction of, federal crimes, including federal

obscenity violations. The provisions of the Bail Act which are challenged by Adult Video are codified at 18 U.S.C. §§ 3142-43, 3147, and 3148. Third, the 1984 Act incorporated the "Sentencing Reform Act of 1984" ("Sentencing Act"), codified at 18 U.S.C. § 3551-3673 and 28 U.S.C. §§ 991-98, which modified federal sentencing parameters, including those applicable to obscenity offenses and to obscenity-predicated RICO offenses.

Adult Video challenges RICO and the Bail and Sentencing Acts where they apply to defendants whose only offenses are obscenity violations. The specific provisions of RICO and the Bail and Sentencing Acts challenged by Adult Video are:

RICO

(i) 18 U.S.C. § 1961(1), which establishes federal and certain state obscenity violations as predicate offenses under RICO;

(ii) 18 U.S.C. §§ 1963(a) and (e), which establish maximum prison terms and fines for RICO convictions and authorize post-judgment forfeiture of any and all assets of or related to any enterprise connected with a RICO violation;

(iii) 18 U.S.C. § 1963(d), which authorizes court orders, including restraining orders and injunctions based on probable cause, designed to preserve the availability of property for forfeiture prior to a trial on the merits;

(iv) 18 U.S.C. § 1964, which authorizes civil RICO sanctions including dissolution and divestiture orders and injunctions against "engaging in the same type of endeavor as the enterprise engaged in";

BAIL ACT

(i) 18 U.S.C. § 3142(e), which authorizes pre-trial detention of "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. . .";[3]

(ii) 18 U.S.C. §§ 3142(d) and 3148(b), which together authorize a ten day detention period pending a bail revocation hearing for defendants of whom there is probable cause to believe that, while on release, they committed a felony and there is no "condition or combination of conditions of release that will assure that the person will not flee or pose a danger to the safety of any other person or the community";

(iii) 18 U.S.C. § 3143(b) which, as amended by the Bail Act, mandates pre-appeal detention unless the requirements for bail set forth at § 3142(e) are met *and* the "appeal is not for purpose of delay and raises a substantial question of law or fact likely to result in" reversal, an order for a new trial, or a sentence that does not include a term of imprisonment or that significantly reduces the term of imprisonment.

SENTENCING ACT

The Sentencing Act created the United States Sentencing Commission ("Commission"), which

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[3] In addition to asserting constitutional objections to 18 U.S.C. § 3142(e) as it applies to obscenity offenses, Adult Video also seeks to *prevent* Thornburgh from interpreting the statute such that obscenity violations are deemed potential threats to the "safety of any other person and the community."

> has enacted sentencing guidelines that provide the basis for determining sentences, including those of defendants convicted of violating RICO and the federal obscenity laws defined at 18 U.S.C. §§ 1461-1465. Absent unusual aggravating or mitigating circumstances which must be made the subject of specific findings, the sentencing guidelines are determinative of the sentence which must be imposed. Adult Video alleges that the base sentencing level (nineteen) for any RICO offense and for certain federal obscenity offenses authorizes unconstitutionally harsh fines and prison terms.

Adult Video alleges that the "foregoing provisions of federal law: (1) cause a chilling effect upon constitutionally protected expression, in violation of the First Amendment to the United States Constitution and the Due Process requirements of the Fifth Amendment to the United States Constitution; (2) authorize prior restraints of speech in violation of those same constitutional provisions; and (3) require imposition of excessive fines, excessive bail, pre-trial and pre-appeal detentions without bail, and cruel and unusual punishment, all in violation of the First and Eighth Amendments to the United States Constitution." Complaint, p. 25, 11. 2-15.

STANDING

Thornburgh has raised the issue of standing. While acknowledging that Adult Video may raise First Amendment objections to the challenged statutes on their face, Thornburgh disputes Adult Video's standing to challenge the statutes as they might be

applied to others. While Thornburgh is correct as a matter of law, his assertions must be clarified.

The traditional rule of standing is that "a person to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court." *New York v. Ferber*, 458 U.S. 747, 769 (1973). However, the traditional standing rule is excepted in the First Amendment context, where "persons [may] attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with the requisite specificity." *Ferber*, 458 U.S. at 769. This exception is necessary because "[t]hose whose expression is 'chilled' by the existence of an overbroad or unduly vague statute cannot be expected to adjudicate their own rights, lacking by definition the willingness to disobey the law." L. Tribe, American Constitutional Law § 12-32 (2d ed. 1988).

Failure to prevail on the merits of a facial First Amendment challenge, however, must not be confused with standing to bring that challenge in the first place: "The requirement that a statute be 'substantially overbroad' before it will be struck down on its face is a 'standing' question only to the extent that if the plaintiff does *not* prevail on the merits of its facial challenge and cannot demonstrate that, as applied to it [i.e., to all persons], the statute is unconstitutional, it has no 'standing' to allege that, as applied to others, the statute might be unconstitutional." *Secretary of State of Md. v. J.H. Munson Co., Inc.*, 467 U.S. 947, 959 (1984) (emphasis added). Of course, the standard for determining whether a statute is overbroad is rigorous.

A statute under attack for facial invalidity must be construed by courts to avoid constitutional problems if it is subject to such a limiting construction. *Ferber*, 458 U.S. at 769. Overbreadth must be substantial before a statute is declared unconstitutional on its face. Similarly, the "mere assertion of some possible self-censorship resulting from a statute is not enough to render an anti-obscenity law unconstitutional . . . ." *Fort Wayne Books, Inc. v. Indiana*, —— U.S. ——, 109 S.Ct. 916, 925-26 (1989). "[D]eterrence of the sale of obscene materials is a legitimate end of state anti-obscenity laws, and [the Supreme Court has] long recognized the practical reality that 'any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene.'" *Id.* (quoting *Smith v. California*, 361 U.S. 147, 154-55 (1959)).

As the overbreadth doctrine applies uniquely to the First Amendment, and as Adult Video has not been prosecuted under the challenged statutes, Adult Video lacks standing to bring its Fifth Amendment due process claims. Adult Video also lacks standing to enjoin Thornburgh from interpreting and applying 18 U.S.C. § 1342(e) in a manner not apparent on the face of the statute. However, Adult Video does have standing to bring its First Amendment objections before this Court.

CHILLING EFFECT

Adult Video alleges that the challenged statutes, where executed in conjunction with obscenity offenses, are overbroad and impermissibly vague, thereby causing a chilling effect on the free expression of protected

speech in violation of the First Amendment. Adult Video claims that the chilling effect is specifically caused by a combination of three factors: (1) the inherent ambiguities of the standard for obscenity set forth in *Miller v. California*, 413 U.S. 15 (1973); (2) the *de minimus* [*sic*] scienter requirements for obscenity offenses; and (3) the "draconian" punishments for obscenity violations now authorized by RICO and the Bail and Sentencing Acts.

Thornburgh's principle [*sic*] argument against such claims is that, because the Supreme Court has held the *Miller* standard *not* to be unconstitutionally vague, any "chilling" argument premised in whole or in part on a different view of *Miller* is untenable. *See, e.g., Smith v. United States*, 431 U.S. 291, 308-09 (1977); *Fort Wayne Books*, 109 S.Ct. at 924 ("Petitioner argues that the 'inherent vagueness' of the standards established by [*Miller*] are at the root of his objection to any RICO prosecution based on predicate acts of obscenity (citation omitted). Yet, this is nothing less than an invitation to overturn *Miller*—an invitation that we reject."). Adult Video acknowledges the Supreme Court's holdings regarding the federal obscenity standard, but claims that *Miller* need not be *unconstitutionally* vague to nevertheless implicate ambiguities which, when combined with other deterrents, cause an impermissible chilling effect.

While there is some practical merit to Adult Video's contention, the Court must construe this argument as an artful attempt to bypass the Supreme Court's dictates regarding *Miller*. A majority of the Supreme Court has consistently held that *Miller* provides a line for distinguishing obscenity from non-obscenity which is bright enough to withstand constitutional chal-

lenge. Such a holding implies that one who commits an obscenity offense is deemed by law to have adequate notice of the wrongfulness of his conduct and a concomitant ability to tailor his behaviour [*sic*] accordingly. In keeping with this reasoning, severe penalties for obscenity violations serve only to deter wrongdoing, not to inhibit lawful activity: if an individual knows the difference between the legal and the illegal, between protected expression and obscenity, harsh penalties will only discourage him from engaging in activity which he *knows* is unlawful and will not, or at least not significantly, deter him from engaging in activity which he *knows* is lawful and thus not subject to prosecution.

Given the Supreme Court's clear mandate regarding the *Miller* standard, it is not within the power of this Court to deny Thornburgh's Motion to Dismiss Adult Video's allegations that the challenged statutes chill free speech.

PRIOR RESTRAINTS[4]

A. *18 U.S.C. § 1963(a) and (e):*

For reasons already stated, the Court is unwilling to hold that RICO's provisions for fines, prison terms,

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[4] It is not entirely clear from the Complaint and opposition papers whether Adult Video is alleging that the Bail and Sentencing Acts constitute prior restraints. However, if such is alleged, the cause of action is hereby dismissed. Harsh penalties and bail provisions which potentially prevent individuals from engaging in free speech do not constitute prior restraints in violation of the First Amendment. If prior restraints could be considered activated against *persons* without reference to any specific materials or speech activities, then prison sentences could never be administered since every individual has the right to engage in free speech.

and forfeiture, create an impermissible chilling effect on free speech. There remains, however, the question of whether RICO's post-trial forfeiture provisions authorize prior restraints.

The Supreme Court has not yet ruled directly on this matter. However, in *Arcara v. Cloud Books*, 478 U.S. 697 (1986), the Supreme Court held that where a punishment does not aim at suppressing free speech, incidental infringements on First Amendment rights do not necessarily render the penalty unconstitutional. In *Arcara*, an adult bookstore was closed down because prostitution had been conducted repeatedly on its premises. The defendant argued that such a penalty effected prior restraints, but Chief Justice Burger, writing for the majority, observed that the defendant was free to run an adult bookstore at any other location and that the closure was aimed only at thwarting the continued use of the defendant's premises for prostitution. In response to *Arcara*, Adult Video relies on *Near v. Minnesota*, 283 U.S. 697 (1931), for the proposition that past speech offenses cannot justify restraints on future speech. While Adult Video is essentially correct as to the holding of *Near*, that proposition of law is not dispositive in this instance.

In *United States v. O'Brien*, 391 U.S. 367 (1968), the Supreme Court determined that statutes which incidentally infringe First Amendment rights may be unconstitutional if they aim at regulating activities which combine "speech" and "non-speech" elements in the same course of conduct. 391 U.S. at 376. If the regulated activity does incorporate speech and nonspeech elements, then a four-pronged test is applied to determine the ultimate constitutionality of the challenged statute.

Obscenity, however, does not incorporate speech and nonspeech elements as envisioned by the *O'Brien* Court. In *O'Brien*, the plaintiff burned his draft card, an illegal activity which the Supreme Court nevertheless recognized as a form of political expression. Implicit in *O'Brien* is that, but for the Government's compelling interest in overseeing conscription, the political statement inherent in burning a draft card would be protected by the First Amendment. In contrast, obscenity is not protected speech. *Miller v. California*, 413 U.S. 15 (1973). As a result, the four-pronged *O'Brien* test is not applicable. *Arcara* is the appropriate analogy: the statute at issue here imposes subsequent punishment as opposed to prior restraint. The Court must therefore dismiss Adult Video's claim that RICO's post-trial forfeiture provisions violate the First Amendment.

B. *18 U.S.C. § 1963(d).*

In *Fort Wayne Books* the Supreme Court reversed as unconstitutional a pretrial seizure order which was based on probable cause and authorized by Indiana's Civil Remedies for Racketeering Activity statute. The order had provided for the seizure of all of the defendants' property which was potentially forfeitable after a trial on the merits. Most notably, the defendants' bookstores were padlocked and their businesses could not continue to operate. In its opinion the Supreme Court stressed the fundamental maxim that "rigorous procedural safeguards must be employed before expressive materials can be seized as 'obscene.'" *Fort Wayne Books*, 109 S.Ct. at 927; *see also Marcus v. Search Warrant*, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). The Supreme Court specifically emphasized that prob-

able cause is insufficient grounds for seizure of presumptively protected speech materials. Indeed, only after a valid judgment is entered that specific materials are unprotected by the First Amendment may such materials be confiscated.

Section 1963(d) of the federal RICO statute provides, in pertinent part, that district courts may "enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section" prior to a trial on the merits. Adult Video argues that this provision is substantively indistinguishable from the Indiana provision which authorized the order stricken by the Supreme Court in *Fort Wayne Books*. The Court does not agree.

Section 1963(d) does not specifically authorize pretrial *seizure* of materials subject to forfeiture. Rather, the statute on its face merely authorizes various forms of judicially approved restraints designed to ensure that potentially forfeitable materials will not be dissipated or destroyed prior to trial. Furthermore, after *Fort Wayne Books* no district court judge can constitutionally order pretrial seizure of presumptively protected materials. Thus § 1963(d) does not authorize unconstitutional pretrial seizures and for this reason the claim for relief under § 1963(d) must be dismissed.

B. [*sic*] *18 U.S.C. § 1964.*

Among the civil sanctions authorized by RICO is a provision that district courts may issue orders "imposing reasonable restrictions on the future activities or investments of any person, including, but not

limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in . . . ." Adult Video argues that this provision authorizes prior restraints in violation of the First Amendment, and the Court finds potential merit in this argument.

Individuals may not be enjoined from engaging in future, presumptively protected speech activities because of prior speech offenses they have committed. *Near v. Minnesota*, 283 U.S. 697 (1931). Thornburgh argues that RICO on its face authorizes only "*reasonable*" restraints and that district courts should be trusted not to issue orders which violate the First Amendment. In this case, however, the mere inclusion of the word "reasonable" in the statute may not save it from facial invalidity. The statute provides district courts with *express* authority to effect apparently unconstitutional prior restraints on future speech. As a result, Adult Video's claim that 18 U.S.C. § 1964 is unconstitutional withstands a motion to dismiss.

IT IS SO ORDERED.

DATED: August 16, 1989

/s/ Ronald S. W. Lew
RONALD S. W. LEW
United States District Judge

CV 87-7894-RSWL, *Adult Video Association et al. v. Richard Thornburgh*, Defendant's Motion to Dismiss the entire First Amended Complaint.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. CV 87-7894 RSWL (Jrx)

ADULT VIDEO ASSOCIATION, a California Corporation, ET AL., PLAINTIFFS

v.

RICHARD THORNBURGH, in his official capacity only as Attorney General of the United States, DEFENDANT

VOLUNTARY DISMISSAL BY STIPULATION ONLY AS TO THOSE CLAIMS NOT ALREADY DISMISSED AND ORDER

[FRCP 41(a)(1)(ii)]

[Filed Jan. 25, 1990; Entered Jan. 29, 1990]

TO THE HONORABLE JUDGE OF SAID COURT:

IT IS HEREBY STIPULATED BY ALL PARTIES TO THE ABOVE-CAPTIONED MATTER:

1. Plaintiffs have brought an action challenging numerous aspects of the Racketeer Influenced and Corrupt Organizations Act ("RICO") as applied to predicate conduct in violation of state and federal obscenity laws.

2. The only defendant in the case, the Attorney General of the United States (originally Edwin Meese, III, now Richard Thornburgh) filed a motion to dismiss the entire Complaint pursuant to FRCP 12(b)(6).

3. On August 18, 1989, this Court filed an Order (entered in [*sic*] August 21, 1989) dismissing many of Plaintiffs' claims. However, in [*sic*] Pages 15 and 16 of that Order, the Court declined to dismiss a portion of Plaintiffs' Complaint involving 18 U.S.C. § 1964.

4. On December 19, 1989, Plaintiffs submitted a Motion for Summary Judgment as to that claim not dismissed by the Court's August 18, 1989 Order.

5. On January 8, 1990, the defendant submitted a Cross-Motion for Summary Judgment addressing the same issue, the only one remaining in the case.

6. Both motions are scheduled for hearing on February 5, 1990.

7. On January 9, 1990, the United States Supreme Court decided *FW/PBS, Inc., et al., v. City of Dallas, et al.*, —— U.S. ——, No. 87-2012 (January 9, 1990).

8. Plaintiffs believe that the opinion does not affect the merits of the constitutional challenge to 18 U.S.C. § 1964. They agree, however, that under FW/PBS they lack standing at this time to challenge the constitutional validity of § 1964, because it has not been invoked to their detriment.

9. Accordingly, Plaintiffs seek dismissal by stipulation of the portion of Plaintiffs' Complaint involving 18 U.S.C. § 1964 that was not disposed of by the Court's Order of August 18, 1989.

10. This Dismissal is with prejudice insofar as any Plaintiff in the future seeks to attack the facial validity of § 1964 in a posture similar to the instant challenge. However, this dismissal in no way precludes any plaintiff from challenging the constitutionality of § 1964 in the event the government brings an action against him under that section.

11. It is contemplated by the parties that, upon dismissal of the remaining claims, a final judgment will be entered, the effect of which will be to allow the plaintiffs to immediately appeal, challenging the Court's Order of August 18, 1989 to the extent that it dismissed Plaintiffs' claims. The parties contemplate that the claim not dismissed pursuant to that Order will be voluntarily dismissed and not subject to appellate review.

DATED: January 22, 1990

Respectfully submitted,

JOHN H. WESTON
WESTON & SARNO

By /s/ John H. Weston
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ORDER

It is so ordered.

Dated: 1/25/90

/s/ Ronald S. W. Lew
U.S. District Court Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-55252

D.C. No. CV-87-7894-RSWL

ADULT VIDEO ASSOCIATION; DOE, INC.; ROE, INC.; PAUL POE, PLAINTIFFS-APPELLANTS

v.

WILLIAM BARR,* ATTORNEY GENERAL OF THE UNITED STATES, DEFENDANT-APPELLEE

Appeal from the United States District Court
for the Central District of California
Ronald S.W. Lew, District Judge, Presiding

Argued and Submitted
May 6, 1991—Pasadena, California

Filed March 12, 1992

OPINION

Before: Thomas Tang, Stephen Reinhardt and Charles Wiggins, Circuit Judges.

Opinion by Judge Tang

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* Attorney General William Barr is substituted for Richard Thornburgh as defendant/appellee, pursuant to Fed. R. App. P. 43(c).

OPINION

TANG, Circuit Judge:

Adult Video Association, Doe, Inc., Roe, Inc., and Paul Poe filed an action seeking a declaration that the federal Racketeer Influenced and Corrupt Organizations Act's ("RICO") criminal provisions are facially unconstitutional when enforced against obscenity offenses. The district court granted the government's motion to dismiss for failure to state a claim. The plaintiffs appeal only the district court's dismissal of their First Amendment challenge to RICO's criminal provisions. We affirm in part and remand in part.

BACKGROUND

RICO, 18 U.S.C. §§ 1961-1968, imposes severe penalties on any person convicted of engaging in a pattern of racketeering activity. The penalties include prison terms of up to twenty years, substantial fines, and forfeieture of

> (1) any interest the [defendant] has acquired or maintained in violation of [RICO];
>
> (2) any—
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> (A) interest in;
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> (B) security of;
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> (C) claim against; or
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> (D) property or contractual right of any kind affording a source of influence over;
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> any enterprise which the [defendant] has established, operated, controlled, conducted or partici-

> pated in the conduct of in violation of [RICO]; and
>
> (3) any property constituting, or derived from, any proceeds which the [defendant] obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of [RICO].

18 U.S.C. § 1963(a). Forfeiture is mandatory upon conviction. *Id.*

The statute also permits the government to apply to a district court for a pre-trial order to preserve assets for forfeiture. 18 U.S.C. § 1963(d). Courts may authorize pre-trial seizures of assets, issue restraining orders and injunctions, require the execution of performance bonds, and "take any other action to preserve the availability of property . . . for forfeiture." 18 U.S.C. § 1963(d)(1).

A defendant is guilty of engaging in a pattern of racketeering activity if that person commits two or more acts of "racketeering activity." 18 U.S.C. § 1961(5). The statute includes a laundry list of racketeering activities, any one of which may serve as a predicate offense in a pattern of racketeering. 18 U.S.C. § 1961(1). In 1984, Congress added to the list of predicate offenses "any act . . . dealing in obscene matter . . . which is chargeable under State law and punishable by imprisonment for more than one year" and "any act which is indictable under" the federal obscenity laws, 18 U.S.C. §§ 1461-1465. 18 U.S.C. § 1961(1); *see also* Pub. L. No. 473, 98 Stat. 1837 (1984).

The appellants, Adult Video Association, Doe, Inc., Roe, Inc., and Paul Poe (collectively, "Adult Video") are a producer, distributor, retailer, and consumer of

sexually explicit videotapes, respectively. They brought an action against the Attorney General of the United States challenging RICO's provisions as facially unconstitutional under the First, Fifth, and Eighth amendments to the federal Constitution.[1]

Adult Video's complaint asserts that RICO's authorization of pre-trial seizures and its comprehensive post-trial forfeiture provisions amount to unconstitutional prior restraints on speech. Adult Video also argues that the severe penalties RICO authorizes for as few as two obscenity violations, when combined with the inherent uncertainty of deciding what qualifies as obscenity, chills constiutionally protected erotic and sexually explicit speech. In support of its position, Adult Video cites the decision of Roe, Inc. not to rent or sell any sexually explicit videotapes and Roe, Inc.'s inability to obtain any nonexplicit, erotic videotapes due to distributors' liability to rent or to buy sexually explicit videos for home viewing, because video stores fear that they will become the object of a racketeering prosecution.

The government moved under Fed. R. Civ. P. 12 (b)(6) to dismiss Adult Video's action for failure to state a claim. In August 1989, the district court granted the motion with respect to every claim except the count challenging RICO's civil remedies. The court rejected Adult Video's argument that a First Amendment chill emanates from a combination of (i) the inherent ambiguities in the definition of obscenity,

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[1] Adult Video presses only the First Amendment claim in this appeal. The original action also attacked RICO's civil remedies, 18 U.S.C. § 1964, as unconstitutional. Adult Video does not contest the constitutionality of RICO's civil remedies here.

(ii) the lax scienter requirement for obscenity, and (iii) the severe punishments RICO authorizes.[2] The court characterized Adult Video's argument as little more than "an artful attempt to bypass" the Supreme Court's definition of obscenity in *Miller v. California*, 413 U.S. 15 (1973).

With respect to Adult Video's prior restraint argument, the district court held that RICO imposed "subsequent punishment," rather than a prior restraint, on defendants duly convicted of obscenity violations. Relying on *Arcara v. Cloud Books, Inc.*, 478 U.S. 697 (1986), the district court concluded that such subsequent punishment did not run afoul of the First Amendment.

Finally, the district court rejected the argument that section 1963(d)'s authorization of pre-trial seizures made the provision facially unconstitutional. The court acknowledged that the Supreme Court's opinion in *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989), effectively foreclosed pre-trial seizures of allegedly obscene materials under RICO. The district court nonetheless found facial invalidation inappropriate because section 1963(d) authorizes a variety of other pre-trial measures the facial constitutionality of which Adult Video does not question.

In January 1990, Adult Video filed a motion for voluntary dismissal of its only remaining claim (the constitutionality of RICO's civil remedies). The dis-

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[2] Adult Video also included in this formula the stiff detention and sentencing provisions contained in the Bail Reform Act of 1984, 18 U.S.C. §§ 3142-43, 3147-48, and the Sentencing Reform Act of 1984, 28 U.S.C. §§ 991-98, as applied to obscenity prosecutions. Adult Video does not rely upon either of these statutes in its argument on appeal.

trict court granted the motion and entered a final judgment on January 25, 1990.

Adult Video subsequently filed a timely notice of appeal to this court.

DISCUSSION

I. *Standard of Review*

We review the district court's dismissal of the complaint for failure to state a claim de novo. *Hartford Accident & Indem. Co. v. Continental Nat'l Am. Ins. Cos.*, 861 F.2d 1184, 1185 (9th Cir. 1988). A complaint should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *Western Reserve Oil & Gas Co. v. New*, 765 F.2d 1428, 1430 (9th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986). We limit our review to the contents of the complaint and construe all allegations of material fact in the light most favorable to Adult Video. *Id.*

II. *Standing and Ripeness*

While the parties do not contest Adult Video's standing, we have an independent obligation to verify its authority to adjudicate this case. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31 (1990). Because the federal government is not prosecuting Adult Video under RICO, Adult Video must show "a 'reasonable threat of prosecution for conduct allegedly protected by the Constitution.'" *Polykoff v. Collins*, 816 F.2d 1326, 1331 (9th Cir. 1987) (quoting *Ohio Civil Rights Comm'n v. Dayton Christian Schs., Inc.*,

477 U.S. 619, 625 n.1 (1986)); *see also Ripplinger v. Collins*, 868 F.2d 1043, 1047 (9th Cir. 1989).

Adult Video passes this test. Each of the parties alleges that it either produces, distributes, sells, or consumes erotic video-tapes and that its activities either could subject it to RICO prosecution or are chilled by the threat of such prosecution. The government's active enforcement of RICO's obscenity provision against other videotape distributors[3] demonstrates that the threat of prosecution is real. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 392-93 (1988).

While Adult Video does face a reasonable threat of prosecution, its complaint challenges more than the constitutionality of RICO obscenity prosecutions in and of themselves. Adult Video also objects to the seizures that may occur prior to prosecution and to the penalties that automatically follow a conviction. Consequently, our standing query must proceed one step further and determine whether Adult Video faces a reasonable threat of pre-trial seizure or post-conviction forfeiture. *See Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 303 (1979).

Nothing in the record before us indicates that the Depatment of Justice has conducted pre-trial seizures in RICO obscenity cases. *See Fort Wayne Books*, 489 U.S. at 67 n.13 (noting that the United States asserted in its 1988 *amicus curiae* brief that it did not engage in such activity). The statute nevertheless authorizes such seizures. In addition, no formal policy of the Department of Justice prohibits its prosecutors or officers from pursuing pre-trial seizures, and en-

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[3] *See, e.g., United States v. Pryba*, 900 F.2d 748 (4th Cir.), *cert. denied*, 111 S. Ct. 305 (1990).

forcement practices may change at any time in any case. Consequently, Adult Video's apprehension concerning pre-trial seizure is reasonable. Therefore, Adult Video does have standing to litigate this claim.

Likewise, because RICO mandates forfeiture upon conviction and expressly defines its scope, leaving district courts no discretion to limit it, we hold that the reasonable threat of prosecution confronting Adult Video necessarily entails a reasonable threat of post-trial forfeiture. *See Sequoia Books, Inc. v. Ingemunson*, 901 F.2d 630, 633-34 (7th Cir.) (court entertains pre-enforcement challenge to post-conviction forfeiture provision), *cert. denied*, 111 S. Ct. 387 (1990); *cf. Babbitt*, 442 U.S. at 303 (challenge to vagueness of criminal penalty provision). Adult Video thus has standing to challenge the post-trial forfeiture provision as unconstitutional.

With respect to the argument of an unconstitutional chill, Adult Video has alleged an actual injury. It alleges an immediate and tangible chill on distribution, as well as on a consumer's and a retailer's ability to obtain erotic and sexually explicit videotapes. "To the extent the provisions require [Adult Video] and similarly situated businesses to exercise self-censorship, they are required to exercise self-censorship today." *Sequoia Books*, 901 F.2d at 634; *see also Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963) (standing exists if governmental action impairs sales by the plaintiffs of arguably protected materials).

The absence of an active prosecution against Adult Video also raises the question of ripeness. Our conclusion that a reasonable threat of prosecution exists, for purposes of standing, effectively dispenses with any ripeness problem. The threat of a pre-trial (in-

deed, pre-prosecution) seizure may be reasonably discerned from the statute's text and the government's practices in other RICO cases.

Adult Video's objections to the post-trial remedy of forfeiture are also ripe. Adult Video's fear of forfeiture is reasonable and is alleged currently to have a concrete impact on Adult Video's exercise of its First Amendment rights. *See Babbitt*, 442 U.S. at 303.[4]

III. *Unconstitutional Chill*

Adult Video contends that the combination of RICO's severe penalty provisions, the nebulous definition of obscenity, and the absence of a rigorous scienter requirement for obscenity offenses hangs like a Sword of Damocles over those engaged in sexually

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[4] Since *Babbitt*, at least four Justices have expressed the view that "it does not follow that a challenge to whatever *remedy* might ultimately be fashioned (should liability be established and relief ordered) is ripe merely upon a showing of a 'reasonable threat' that proceedings will commence." *Ohio Civil Rights*, 477 U.S. at 633 n.4 (Stevens, J., concurring) (original emphasis); *see also Fort Wayne Books*, 489 U.S. at 60 (challenge to state RICO civil forfeiture not ripe because "[t]hese claims can only be reviewed when (or if) such remedies are enforced against petitioner"). These cases are distinguishable, though, because the only uncertainty in this case is whether prosecution will result. The federal RICO statute prescribes the penalty that district courts *must* impose. Justice Stevens' concurrence spoke to a situation where the adjudicative body had the authority to tailor its remedies to avoid a constitutional violation. *See Ohio Civil Rights*, 477 U.S. at 633 n.4. Likewise, the pursuit of civil forfeiture in addition to criminal penalties under Indiana's RICO statute is optional for prosecutors. *See Fort Wayne Books*, 489 U.S. at 60.

explicit speech, unconstitutionally chilling protected communication.

Adult Video's concerns about the fragility of sexually explicit speech and the likely consequences of its entanglement in this regulatory web have great practical appeal. The Supreme Court, however, has already rejected an essentially identical argument in *Fort Wayne Books*. There the Supreme Court found unpersuasive the bookstore operators' contention that the inherent vagueness of *Miller*'s obscenity standard and the draconian penalties attaching to a RICO conviction in Indiana transgressed the First Amendment. The Court characterized the vagueness argument as "nothing less than an invitation to overturn *Miller*—an invitation that we reject." 489 U.S. at 57; *see also Alexander v. Thornburgh*, 943 F.2d 825, 832 (8th Cir. 1991).

Here, as in *Fort Wayne Books*, the RICO statute simply incorporates the state and federal obscenity laws—laws which Adult Video does not contend violate *Miller*'s constitutional limitations on the definition of obscenity. Whatever vagueness or indefiniteness plagues these statutes is, as long as *Miller* remains good law, constitutionally tolerable. Transporting these laws into RICO does not exacerbate the haziness of the obscenity definition. It simply alters the format for prosecuting repeated violations of the obscenity laws. *See Fort Wayne Books*, 489 U.S. at 58 ("Given that the RICO statute totally encompasses the obscenity law, if the latter is not unconstitutionally vague, the former cannot be vague either."); *Alexander v. Thornburgh*, 713 F. Supp. 1278, 1291 & n.7 (D. Minn.), *appeal dismissed*, 881 F.2d 1081 (8th Cir. 1989).

The Supreme Court also dismissed the bookstore operators' objections to Indiana's stiff RICO penalties by declaring any additional deterrent effect on protected speech to be the inevitable consequence of the criminal law's legitimate efforts to deter and to punish obscenity:

> It may be true that the stiffer RICO penalties will provide an additional deterrent to those who might otherwise sell obscene materials; perhaps this means—as petitioner suggests—that some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect on the dissemination of material not obscene."

Id. at 60 (quoting *Smith v. California*, 361 U.S. 147, 154-55 (1959)) (citation omitted); *see also Sequoia Books*, 901 F.2d at 637 ("The *in terrorem* effects of which Sequoia complains are simply the intended by-product of a legislative decision to punish those who deal in obscene materials and to make that business more costly."); *United States v. Pryba*, 900 F.2d 748, 756 (4th Cir.) (chill caused by RICO penalties does not violate the First Amendment because "[t]he fact that a person does some business disseminating protected materials cannot immunize that person from [penalties] that may be imposed for violation of criminal law") (quotation omitted), *cert. denied*, 111 S. Ct. 305 (1990); *Polykoff*, 816 F.2d at 1340 n.9.

Fort Wayne Books is thus dispositive of Adult Video's unconstitutional chill agrument.

IV. *Unconstitutional Overbreadth*

Adult Video argues that RICO, as applied to obscenity, is subject to facial invalidation for overbreadth. Specifically, Adult Video contends that the penalty provisions impermissibly stifle constitutionally-protected sexually explicit speech. Enforcement of RICO in the obscenity context, Adult Video continues, can never legitimately occur because they consequent forfeiture would represent an unconstitutional prior restraint.

The overbreadth doctrine constitutes an exception to the general rule requiring the constitutionality of a statute to be tested against the conduct of the party before the court. It permits a party to challenge a law, not on the ground that the statute is unconstitutional as enforced against it, but rather on the ground that the statute's application to third persons not before the court violates the First Amendment. *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. at 789, 798-99 & n.17 (1984); *see also New York v. Ferber*, 458 U.S. 747, 768-69 (1982).

> [T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. This is deemed necessary because persons whose expression is constitutionally protected may well refrain from exercising their rights for fear of criminal sanc-

> tions provided by a statute suspectible of application to protected expression.

Taxpayers for Vincent, 466 U.S. at 799 n.17 (quotations and citations omitted). In order to prevail, the plaintiff must demonstrate "substantial" overbreadth, " 'judged in relation to the statute's plainly legitimate sweep.' " *Taxpayers for Vincent*, 466 U.S. at 799-800 (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

In light of these precedents, we reject Adult Video's overbreadth challenge. Adult Video's argument is little more than an amalgam of its unconstitutional prior restraint and chill arguments. Adult Video has not demonstrated the type of showing necessary to maintain an overbreadth challenge on First Amendment grounds. Adult Video's overbreadth theory simply mirrors the constitutional arguments it makes concerning the RICO obscenity provisions' effects on its own ability to produce, distribute, sell, and consume sexually explicit videotapes.

The *Taxpayers for Vincent*, the Supreme Court rebuffed an overbreadth argument on precisely this ground:

> This is not . . . an appropriate case to entertain a facial challenge based on overbreadth. For we have found nothing in the record to indicate that the ordinance will have any different impact on any third parties' interests in free speech than it has on [plaintiffs].
>
> . . . [Plaintiffs] have, in short, failed to identify any significant difference between their claim that the ordinance is invalid on overbreadth grounds and their claim that it is unconstitu-

> tional when applied to [them]. . . . [Plaintiffs] have simply failed to demonstrate a realistic danger that the ordinance will significantly compromise recognized First Amendment protections of individuals not before the Court.

Id. at 801-02.

V. *RICO's Pre-Trial Seizure and Post-Trial Forfeiture Provisions*

A. *Pre-Trial Seizures*

Adult Video contends that RICO's section 1963(d) is facially unconstitutional because it permits the pre-trial seizure of videotapes based only on a finding of probable cause to believe they are obscene.

The Supreme Court's recent opinion in *Fort Wayne Books* leaves little room for argument over the unconstitutionality of pre-trial seizures of allegedly obscene materials. Indeed, the government foregoes any such argument here. The Supreme Court held in *Fort Wayne Books* that pre-trial seizures of allegedly obscene books and films pursuant to Indiana's RICO statute violated the First Amendment. "[P]robable cause to believe that there are valid grounds for seizure," the Court explained, "is insufficient to interrupt the sale of presumptively protected books and films." 489 U.S. at 66.

This holding translates readily to the federal RICO context. Indeed, the Supreme Court noted that Indiana's RICO statute was "similar" to the federal racketeering law. *Fort Wayne Books*, 489 U.S. at 67 n.13. Federal RICO also permits pre-trial seizures upon a showing of probable cause. Thus the Supreme Court's concern that films not be removed from cir-

culation prior to "[a] determination that the seized items [are] 'obscene' or that a RICO violation *has occurred*" applies with equal vigor in this instance. *Id.* at 66 (original emphasis). The First Amendment will not tolerate such seizures until the government's reasons for seizure weather the crucible of an adversary hearing. *Id.* at 67 ("[W]here the RICO violation claimed is a pattern of racketeering that can be established only by rebutting the presumption that expressive materials are protected by the First Amendment, that presumption is not rebutted until the claimed justification for seizing books or other publications is properly established in an adversary proceeding.") (footnote omitted).[5]

Because the reasoning of *Fort Wayne Books* is equally applicable to the federal RICO statute, we hold that the portion of section 1963(d) that authorizes pre-trial seizures is unconstitutional on its face.[6] We therefore reverse on this issue and direct the district court to enter judgment for Adult Video.

B. *Post-Trial Forfeiture*

Adult Video argues that RICO's post-trial forfeiture penalty constitutes an unlawful prior restraint

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[5] The Supreme Court's concerns about premature seizure of expressive material operate even more forcefully in this case. Under Indiana's law, the defendant had already been convicted of the predicate RICO offenses, so the seizures were based upon both a history of obscenity convictions as well as probable cause. *Fort Wayne Books*, 489 U.S. at 66. Under the federal RICO statute, the predicate offenses need not be established prior to trial.

[6] Because Adult Video does not challenge the other pre-trial procedures authorized by section 1963(d), we need not address their constitutionality.

because, by seizing assets beyond those adjudged obscene, it exacts as a toll for past transgressions the defendant's ability to communicate in the future. While we decline to equate these forfeitures with prior restraints, we also conclude that some tailoring of the scope of forfeiture is necessary to harmonize RICO's post-trial forfeiture penalty with the First Amendment.

1. *Prior Restraint*

Because a RICO forfeiture occurs only after a criminal trial on the obscenity issue, with its full panoply of procedurel protections, the forfeiture represents punishment for engaging in obscenity rather than a prior restraint. "There is a historical distinction between prior restraints and criminal penalties in the first amendment setting, which has both practical consequences and a theoretical basis." *Polykoff*, 816 F.2d at 1337.

The primary concern animating the Supreme Court's prior restraint jurisprudence has been to prevent the government from seizing materials or otherwise halting speech prior to a determination that the speech is actually harmful. *See, e.g., Fort Wayne Books*, 489 U.S. at 66-67 (seizure inappropriate because effected prior to a judicial determination of obscenity); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 316-17 (1980) (per curiam) (prior restraint unconstitutional because speech not yet adjudged unlawful); *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 210 (1964) (warrant for seizure unconstitutional because not preceded by a hearing on obscenity); *Marcus v. Search Warrant of Property at 104 E. Tenth St.*, 367 U.S. 717, 731 (1961) (warrants to seize alleged obscenity unconsti-

tutional because of inadequate procedural safeguards); *cf. Kingsley Books, Inc. v. Brown*, 354 U.S. 436, 444-45 (1957) (seizure after determination of obscenity in a criminal trial does not violate the First Amendment). The Court's constant refrain has been that it is better to punish harmful speech after it occurs than to smother it at birth. *See, e.g., Vance*, 445 U.S. at 316 n.13 ("[A] free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand.") (original emphasis); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 714-15 (1931).

The prior restraint cases do not stand for the proposition that harmful speech can never be punished. To the contrary, case law expressly permits punishment so long as the process for determining the appropriateness of sanctions "embod[ies] the most rigorous procedural safeguards" and is "ringed about with adequate bulwarks." *Bantam Books*, 372 U.S. at 66. The protections contained in a criminal RICO prosecution—such as the allocation of the burden of proof, a heightened standard of proof, and adversariness—satisfy *Bantam*'s command.

In *Kingsley Books*, the Supreme Court sustained a New York statute permitting the seizure of obscene books and an order enjoining the defendant from further distribution of such books because, unlike the prior restraint cases, a court imposed these penalties only after the books had been adjudged obscene in a criminal trial. 354 U.S. at 445 ("Unlike *Near* [*v. Minnesota*], [the New York Law] is concerned solely with obscenity and . . . studiously withholds restraint upon matters not already published and not yet found to be offensive."); *see also Bantam Books*, 372 U.S. at 70 ("Criminal sanctions may be applied only after

a determination of obscenity has been made in a criminal trial hedged about with the procedural safeguards of the criminal process.").

RICO likewise postpones forfeiture until a judicial determination of obscenity is made after a criminal trial.[7] Only at this point does RICO permit "the seizure . . . of the instruments of ascertained wrongdoing." *Kingsley Books*, 354 U.S. at 444; *see also Sequoia Books*, 901 F.2d at 636 (post-trial forfeiture under Illinois obscenity statute does not violate the First Amendment because "Illinois does not attempt here to regulate the sale of protected reading materials or to close bookstores. It merely punishes past obscenity convictions."); *Western Business Sys., Inc. v. Slaton*, 492 F. Supp. 513, 514 (N.D. Ga. 1980) (post-trial forfeiture under Georgia's RICO statute does not entrench upon free speech rights).

The purpose of the forfeiture is to strip the defendant of the tools and profits of criminal conduct and thereby to terminate the illegal enterprise. Thus, unlike prior restraints, it is the defendant's unlawful commercial conduct (dealing in obscenity) rather than the defendant's anticipated speech that sets into motion a RICO forfeiture. In *Arcara*, 478 U.S. at 705-07, the Supreme Court upheld an order of closure of an adult bookstore. It refused to equate the closure with a prior restraint in part because, as with RICO, non-expressive conduct (prostitution on the premises), rather than speech, prompted the closure. *Id.* at 705 n.2; *see also Pryba*, 900 F.2d at 755.

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[7] As noted earlier, we have no occasion to address the facial constitutionality of RICO's civil forfeiture provision, 18 U.S.C. 1964, in this case.

Also like the orders sustained in *Arcara* and *Kingsley Books*, RICO forfeiture does not silence the defendant. Forfeiture simply precludes the defendant from using assets derived from the obscenity trade to subsidize future speech. *See Arcara*, 478 U.S. at 706 n.2 (order "impose[s] no restraint at all on the dissemination of particular materials, since respondents are free to carry on their bookselling business at another location"); *511 Detroit St., Inc. v. Kelley*, 807 F.2d 1293, 1299 (6th Cir. 1986) (heavy fines imposed under Michigan's anti-obscenity law do not constitute prior restraints because "there is no prospective legal restraint on any expression, obscene or protected, that [defendants] . . . may choose to undertake"), *cert. denied*, 482 U.S. 928 (1987). A forfeiture is not a gag order. RICO defendants do not risk contempt if they revive that portion of their business dealing in sexually explicit and erotic videotapes after conviction. Defendants simply have no First Amendment right to use the profits and proceeds from trafficking in obscenity to finance their constitutionally protected speech. We agree with the Fourth Circuit that "defendants may not launder their money derived from racketeering activities by investing it in bookstores, videos, magazines and other publications. The First Amendment may be used as a shield, but it is not a shield against criminal activity." *Pryba*, 900 F.2d at 755.

2. *Scope of Forfeiture*

Although we will not characterize RICO forfeiture as a prior restraint, we do consider it necessary to tailor the scope of the forfeiture permitted by statute to alleviate constitutional concerns about curtailing

legitimate speech in the name of fighting obscenity. While the authorization of a forfeiture does not by itself render the RICO statute unconstitutional, to the extent section 1963 mandates forfeiture of more property than the Constitution will tolerate as punishment for an obscenity offense, the statute is unconstitutional on its face.

As noted earlier, the scope of RICO forfeiture is extremely broad, reaching nearly every asset remotely connected with the offense. "[F]orfeiture is not limited to those assets of a RICO enterprise that are tainted by use in connection with racketeering activity, but rather extends to the convicted person's entire interest in the enterprise." *United States v. Busher*, 817 F.2d 1409, 1413 (9th Cir. 1987). We have already observed that "RICO's breadth and inflexibility counsel[] caution, for no penalty is per se constitutional." *Id.* at 1414 (quotation omitted); *cf. Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, —— U.S. ——, 112 S. Ct. 501, 511-12 (1991) (statute designed to deprive convicted criminals of profits and proceeds from publicizing their crimes not sufficiently tailored to survive First Amendment scrutiny).

For purposes of comparison, a number of other obscenity statutes contain markedly less drastic forfeiture provisions than federal RICO does. Illinois's obscenity statute permits forfeiture only of the direct and indirect proceeds of obscenity violations and the assets used wholly or in part to subsidize the actual criminal conduct. *See Sequoia Books*, 901 F.2d at 632; *see also id.* at 637-38 (comparing the scope of forfeiture permitted by Illinois law and by federal RICO). The federal Child Protection and Obscenity Enforcement Act likewise limits forfeitures to (i) the

obscene materials themselves, (ii) property constituting or traceable to the gross profits or proceeds obtained from the offense, and (iii) property actually used or intended to be used to commit or to promote the offense. 18 U.S.C. §§ 1466(a), 2253(a); *cf. Fort Wayne Books*, 489 U.S. at 65 ("[W]e assume without deciding that bookstores and their contents are forfeitable . . . when it is proved that these items are property *actually used in, or derived from*, a pattern of violations of . . . obscenity laws.") (emphasis added).[8]

The Supreme Court, in the past, has recognized the need to tailor criminal rules narrowly and carefully when they seek to operate within the First Amendment arena. "Our decisions furnish examples of legal devices and doctrines in most applications consistent with the Constitution, which cannot be applied in settings where they have the collateral effect of inhibiting the freedom of expression, by making the individual the more reluctant to exercise it." *Smith*, 361 U.S. at 150-51 (citing examples); *see also Simon & Schuster*, 112 S. Ct. at 512 (New York's "Son of Sam" law held to be "inconsistent with the First Amendment" because not narrowly tailored to achieve goal of compensating victims from the fruits of the crime); *Quality of Books*, 378 U.S. at 211-12 (state may not treat ordinary contraband and obscene books the same for purposes of seizure because of the First Amendment concerns infusing the latter); *accord Speiser v. Randall*, 357 U.S. 513, 525 (1958) ("The

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[8] Indiana's RICO statute requires forfeiture only of property "used in the course of, intended for use in the course of, derived from, or realized through" the racketeering activity. *Fort Wayne Books*, 489 U.S. at 51.

separation of legitimate from illegitimate speech calls for . . . sensitive tools. . . .")

In light of these precedents, the current breadth of RICO's forfeiture provision cannot pass constitutional muster. Forfeiture of those assets actually used in connection with the obscenity offense—that is, used to produce, market, or move obscenity through interstate commerce—does not run afoul of the First Amendment. Nor is the forfeiture of assets and interests substantially financed, directly or indirectly, by the proceeds of criminal activity constitutionally troublesome.

However, those assets or interests of the defendant invested in legitimate expressive activity being conducted by parts of the enterprise uninvolved or only marginally involved in the racketeering activity may not be forfeited. As in *Busher*, district courts should not, absent exceptional circumstances, "order forfeiture of a defendant's entire interest in an enterprise that is essentially legitimate where he has committed relatively minor RICO [obscenity] violations not central to the conduct of the business and resulting in relatively little illegal gain in proportion to its size and legitimate income." 817 F.2d at 1415-16. Because Adult Video raises only a facial attack, we leave for the district courts the specific formulation of RICO forfeiture orders that are consistent with the First Amendment, in light of the particular facts presented in individual cases. *Cf. id.*

The government no doubt believes that diminishing the scope of RICO forfeiture in this manner will dilute the statute's deterrent effect and risk a resurrection of the criminal enterprise. While these are important concerns, the incremental contribution that RICO's current sweeping forfeiture provisions make

to the deterrence and destruction of criminal enterprises over what would be accomplished under a narrower definition of forfeitable assets does not justify the additional curtailment of constitutionally protected, sexually explicit speech. *See Simon & Schuster*, 112 S. Ct. at 509 ("[W]e have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment.") (quoting *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 592 (1983)). Tailoring the scope of forfeiture acknowledges that in obscenity cases, unlike traditional RICO prosecutions, a countervailing concern for protecting the public's right to receive, as well as the defendant's right to engage in, non-obscene speech demands a more delicate approach to forfeitures. *See Marcus*, 367 U.S. at 736 (expressing concern for the "public's opportunity to obtain . . . publications" because the state's obscenity seizure law deterred the sale and distribution of speech falling under the First Amendment's aegis). The forfeiture of assets derived from drugs, arson, fraud, and murder rarely, if ever, implicates a public right of access to information. The forfeiture of assets loosely affiliated with obscenity offenses, by contrast, hurts not just the defendant, but also those members of the public who wish to obtain sexually explicit and erotic videotapes. Government "is not free to adopt whatever procedures it pleases for dealing with obscenity . . . without regard to the possible consequences for constitutionally protected speech." *Id.* at 731; *see also Smith*, 361 U.S. at 154 (strict liability provision in obscenity statute unconstitutional because it would "restrict the public's access to

forms of the printed word which the State could not constitutionally suppress directly").

In sum, we hold that RICO's provisions permitting the pretrial preservation of assets for forfeiture are not facially unconstitutional in obscenity cases. Only that part of section 1963(d) that authorizes pre-trial seizures of obscene materials on the basis of probable cause is unconstitutional. Post-trial forfeitures do not, on their face, amount to prior restraints. We find it necessary, however, to tailor the scope of RICO forfeitures in obscenity cases in order to conform the statute to the dictates of the First Amendment. So delineated, RICO's post-trial forfeiture provisions are not facially unconstitutional.

CONCLUSION

James Madison observed that "'[s]ome degree of abuse is inseparable from the proper use of everything.'" *Near*, 283 U.S. at 718 (quoting *Report on the Virginia Resolutions*, *Madison's Works*, vol. iv, 544). Speech, perhaps more than any other constitutionally protected activity, offers a daily demonstration of the truth of Madison's words. The First Amendment, however, strictly regulates government's authority to punish expression in the name of curbing abuse. Our Constitution prefers to err on the side of protecting speech. "[I]t is better to leave a few of [speech's] noxious branches to their luxuriant growth, than, by pruning them away, to injure the vigour of those yielding the proper fruits." *Id.* (quoting *Report on the Virginia Resolutions*, *Madison's Works*, vol. iv, 544). RICO's scattershot method of criminal prosecution is ill-suited to the delicate task of policing sexually explicit expression.

Although we hold that forfeiture provisions in general do not amount to unconstitutional prior restraints, the breadth of RICO's current forfeiture provision is incompatible with the First Amendment. Only those assets traceable to or substantially intertwined with the obscenity racketeering enterprise may be forfeited. Similarly, while we uphold section 1963 (d)'s provision for the pre-trial preservation of assets, we invalidate that portion of the section that permits pre-trail seizures of obscenity merely on a showing of probable cause.

Adult Video has not made out a claim of overbreadth because it has not demonstrated that RICO impacts third parties' speech any differently than it does its own.

Finally, we reject Adult Video's unconstitutional chill argument, in light of the Supreme Court's disposition of a similar claim in *Fort Wayne Books*.

The decision of the district court is AFFIRMED IN PART and REVERSED IN PART. Each party to this appeal shall bear its own costs.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 90-55252
D.C.# CV-87-7894-RSWL

ADULT VIDEO ASSOCIATION; DOE, INC.;
ROE, INC.; PAUL POE, PLAINTIFFS-APPELLANTS

vs.

WILLIAM BARR,* ATTORNEY GENERAL OF THE
UNITED STATES, DEFENDANT-APPELLEE

ORDER

[Filed Jul. 7, 1992]

BEFORE: TANG, REINHARDT, and WIGGINS,
Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* Attorney General William Barr is substituted for Richard Thornburgh as defendant/appellee, pursuant to Fed. R. App. P. 43(c).

APPENDIX F

1. The First Amendment to the Constitution of the United States provides in part:

> Congress shall make no law * * * abridging the freedom of speech.

2. 18 U.S.C. 1962 provides in part:

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity * * * to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. * * *
>
> (b) It shall be unlawful for any person through a pattern of racketeering activity * * * to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.
>
> (c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity * * *.

3. 18 U.S.C. 1963 provides in part:

> (a) Whoever violates any provision of section 1962 * * * shall forfeit to the United States * * *—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity * * *.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. * * *

(b) Property subject to criminal forfeiture under this section includes—

(1) real property, including things growing on, affixed to, and found in land; and

(2) tangible and intangible personal property, including rights, privileges, interests, claims, and securities.

(c) All right, title, and interest in property described in subsection (a) vests in the United

States upon the commission of the act giving rise to forfeiture under this section. Any such property that is subsequently transferred to a person other than the defendant may be the subject of a special verdict of forfeiture and thereafter shall be ordered forfeited to the United States, unless the transferee establishes in a hearing pursuant to subsection (*l*) that he is a bona fide purchaser for value of such property who at the time of purchase was reasonably without cause to believe that the property was subject to forfeiture under this section.

(d) (1) Upon application of the United States, the court may enter a restraining order or injunction, require the execution of a satisfactory performance bond, or take any other action to preserve the availability of property described in subsection (a) for forfeiture under this section—

(A) upon the filing of an indictment or information charging a violation of section 1962 of this chapter and alleging that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section; or

(B) prior to the filing of such an indictment or information, if, after notice of persons appearing to have an interest in the property and opportunity for a hearing, the court determines that—

(i) there is a substantial probability that the United States will prevail on the issue of forfeiture and that failure to enter the order will result in the

property being destroyed, removed from the jurisdiction of the court, or otherwise made unavailable for forfeiture; and

(ii) the need to preserve the availability of the property through the entry of the requested order outweighs the hardship on any party against whom the order is to be entered:

Provided, however, That an order entered pursuant to subparagraph (B) shall be effective for not more than ninety days, unless extended by the court for good cause shown or unless an indictment or information described in subparagraph (A) has been filed.

(2) A temporary restraining order under this subsection may be entered upon application of the United States without notice or opportunity for a hearing when an information or indictment has not yet been filed with respect to the property, if the United States demonstrates that there is probable cause to believe that the property with respect to which the order is sought would, in the event of conviction, be subject to forfeiture under this section and that provision of notice will jeopardize the availability of the property for forfeiture. Such a temporary order shall expire not more than ten days after the date on which it is entered, unless extended for good cause shown or unless the party against whom it is entered consents to an extension for a

longer period. A hearing requested concerning an order entered under this paragraph shall be held at the earliest possible time, and prior to the expiration of the temporary order.

(3) The court may receive and consider, at a hearing held pursuant to this subsection, evidence and information that would be inadmissible under the Federal Rules of Evidence.

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